United States Export Controls

FOURTH EDITION

William A. Root
John R. Liebman

ASPEN LAW & BUSINESS

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HIGHLIGHTS

United States Export Controls, Fourth Edition

by William A. Root and John R. Liebman

The Fourth Edition of *United States Export Controls*, by William A. Root and John Liebman, provides highly useful assistance to exporters' understanding of exceedingly complex and convoluted regulations. Violation of these regulations can result, and often has resulted, in severe criminal as well as civil penalties. Therefore, the sophisticated knowledge of the rules that can be obtained from this book is highly desirable.

The book's identification of thousands of inconsistencies within and among the regulations of the Commerce, State, and Treasury Departments can help an exporter avoid reliance on misleading information in one section that is contradicted in another. Such reliance might lead to an unsuspected violation or to an unnecessary loss of an export sale.

In addition, the new Fourth Edition contains:

- An in-depth analysis of the new encryption controls, which became effective January 14, 2000, including a description of each of the numerous scattered relevant parts of the Commerce Department's Export Administration Regulations (EAR), many of which were neither revised nor referenced in the new regulation.

- Line-in, line-out changes in the Commerce Control List (CCL) needed to conform with multilaterally agreed texts, some of which will eventually be made in the CCL and the remainder of which will inform exporters of differences between controls on exports from the United States and on exports from other cooperating countries.
- A complete index of the CCL, not otherwise publicly available.
- A step-by-step analysis of how to decide whether a license is required to export a computer, taking into consideration the ten General Prohibitions, no license required (NLR) rules, License Exceptions, actions taken under National Defense Authorization Act restrictions, and a February 1, 2000, Presidential determination.
- Line-in line-out changes in the United States Munitions List (USML) and the CCL in order to remove double coverage and to conform with a goal once stated in draft legislation to conform these two U.S. lists with multilaterally agreed distinctions between munitions and dual-use items, thus alerting the reader to commodity jurisdiction issues that are not otherwise apparent.
- Analysis of the relevance of Bureau of Alcohol, Tobacco, and Firearms (BATF) regulations, including circumstances under which a BATF license as well as a State Department license are needed for the same export transaction.
- Description of the narrowing of the Canadian exemption from USML license requirements.
- Descriptions of new embargoes of Serbia less Kosovo and of Taliban-controlled areas of Afghanistan and of completely revised regulations affecting exports to Iran.

Note that, as we went to press, the Commerce Department amended the Export Administration Regulations to "make certain editorial revisions and clarifications to the anti-boycott provisions

of the [regulations] (15 CFR Part 760)." These changes will be addressed in detail in the next update to the Fourth Edition.

The Fourth Edition also contains extensive tables and appendices, and indices.

8/00

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FOURTH EDITION

William A. Root
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This work is dedicated to the memory of Rauer H. Meyer, who inspired this book and to the memory of Marilyn Liebman, who patiently endured its many updates and revisions.

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PREFACE

The Fourth Edition of this work was prepared to respond to a number of significant developments in the area of U.S. export controls. Unfortunately, one of them was not the reauthorization of the Export Administration Act. As many readers of this work already know, Congress has consistently failed to reauthorize this basic legislation, with the result that the control apparatus that the Commerce Department has administered has been working within the framework of successive executive orders under the International Emergency Economic Powers Act. This continues to breed uncertainty regarding the enforceability of the Export Administration Regulations.

The authors nonetheless determined that it was time to prepare this new edition. A number of salient developments in specific export controls had occurred, most notably a radically different approach to encryption in a January 14, 2000 regulation. Other significant changes include a congressionally mandated reversion of regulatory jurisdiction over communication satellites from the Commerce Department back to the State Department; increases in computer control thresholds within legislated constraints; expansion of controls pursuant to the Chemical Weapons Convention and to Organization of American States model firearms regulations; reduction in the munitions control exemption for Canada; new sanctions against Serbia (less Kosovo) and against Taliban-controlled areas of Afghanistan; a major revision in Iranian sanction regulations; and a congressionally required review of sanctions against India and Pakistan. In addition, many transitional issues created by the complete revision of the Export Administration Regulations in 1996 had acquired definition. We also perceived a need to discuss munitions import regulations administered by the Bureau of Alcohol, Tobacco and Firearms that also impact on some export transactions.

We hope that the readers of this work will continue to share their observations and criticisms with us, so that we in turn can respond to the ever-changing needs of the exporter.

We wish to acknowledge the many contributions of our colleagues: Ira Rubinstein, a senior corporate attorney for Microsoft Corporation; Edward W. Lew, an associate attorney at McKenna & Cuneo's Los Angeles office; Johnny Traboulsi, a 1999 summer associate at the same office; and Niki Demirbilek, a German lawyer who interned at McKenna & Cuneo during the summer of 1999.

Although both authors participate in advisory committees to the Commerce Department, the views expressed herein do not necessarily reflect the views of those committees or the views of that Department.

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William A. Root
John R. Liebman

ABOUT THE AUTHORS

William A. Root is an export control consultant working out of Kensington, Maryland. Mr. Root is a former Director of the Office of East-West Trade at the Department of State. He is a member of the Regulations and Procedures Technical Advisory Committee established under the Export Administration Act.

John R. Liebman is Counsel to McKenna & Cuneo, L.L.P., resident in the firm's Los Angeles office. His practice emphasizes multinational business and financial transactions and international trade regulation, advising international trade companies, exporters, technology-based companies, manufacturers, and financial institutions. Previously, Mr. Liebman served in Washington, D.C. with the Agency for International Development, Department of State, first as counsel and later as program director. His bar affiliations include, in addition to the State Bar of California and United States District Court for the Central District of California, the United States Supreme Court, the Courts of Appeal for the Ninth Circuit and the District of Columbia, and the United States Court of International Trade. He is also licensed to practice in the State of New York. Mr. Liebman is a former member of the California State World Trade Commission and presently serves as a member of the President's Export Council Subcommittee on Encryption. He is past Chair of the California State Bar International Law Section.

INTRODUCTION

The authors have had two objectives: (1) to explain export controls in terms that the uninitiated can easily understand and (2) to assist exporters to comply with the mind-boggling complexities of the regulations. Unfortunately it is impossible to further both objectives in the same text. Accordingly, plain text designed to be easily (or, at least, relatively easily!) understood is followed by detailed regulatory analyses amplified by tables, appendices, and indices.

On a typical working morning in Los Angeles, a manufacturer of sophisticated laser devices is preparing to receive a delegation of engineers from a foreign country. Across town, the president of a small company that manufactures a technologically advanced medical testing device has just received a telex from a French customer reporting the failure of a critical component of the device, a printed circuit board with sophisticated integrated circuits. Immediate shipment of a replacement is demanded. Although involved in different business activities, these two enterprises have more in common than they realize.

The marketing vice president of the laser company, at that moment, concludes a meeting with his counterpart in the engineering department, and returns to his office to receive the delegation of foreign engineers. A slide projector and charts have been readied in the conference room and department heads from the plant have been thoroughly prepared to conduct the visitors on "walking tours" through their respective areas. Plant areas containing proprietary "trade secrets" have been cordoned off, following procedures instituted in consultation with corporate counsel. Satisfied that all "trade secrets" have been winnowed from the presentation he is about to make, and that his guests will receive up-to-date technical data in use throughout his industry, the executive greets his visitors and begins his presentation.

The president of the medical device company calls the chief of his international division and instructs him to airship the replacement circuit board to the French customer by the earliest available flight.

Since the medical device itself had not required an export license for many years, it does not occur to the company officials that an export license might be necessary for the component. The shipment is made and by nightfall a telephone call from the satisfied customer reports that the component was received and the testing device is back in service.

In these hypothetical cases, two U.S. firms — probably totally unintentionally — have ventured into transactions regulated by the Federal Government. Both firms probably have violated the Export Administration Regulations (EAR), administered by the U.S. Department of Commerce.

Export controls are not new, nor are they peculiar to the United States. Furthermore, they are treated by the government with the utmost seriousness.

The first body of U.S. peacetime regulatory controls on exports of non-military commodities and technical data was formulated in 1949 following the enactment by Congress of the Export Control Act of 1949. Authority for the administration of this statute was delegated by the President to the Secretary of Commerce. This Act, as supplemented and amended over the ensuing years, was superseded by the Export Administration Act of 1969.

The 1969 Act encouraged trade in peaceful goods with the Soviet Union and the communist countries of Eastern Europe within the framework of export controls and, together with its administrative regulations, set the scene for U.S. export controls during the 1970s. Led by the *detente* between the superpowers and the deterioration of U.S. export performance, the economic and political developments of the 1970s brought about pressures from both Congress and the business community to reduce some export controls and to expedite the licensing process.

Congressional concern with reducing the impact of controls on trade was reflected in the next major amendment to this legislation, the Export Administration Act (EAA) of 1979, in two principal ways: first, the policy directive to the Secretary of Commerce that he provide for a periodic review of the list of commodities under control; and, second, the imposition of rigorous deadlines on the processing of export license applications by the Department of Commerce and other participating agencies. The U.S. business community advocated the adoption of these two amendments to ameliorate the most serious perceived disincentives to effective

export marketing. In the 20 years since then, the EAA has expired (as has the Soviet Union). However, export controls continue under emergency legislative authority, largely unchanged. Executive Orders direct that the provisions of the latest amended version of the EAA before it expired be followed to the extent permitted by law. Another Executive Order sets revised deadlines for case processing, but, somewhat inconsistently, it also gives other participating agencies to right to review any case. The Export Administration Regulations (EAR) (15 CFR 730-774), which are issued by the Department of Commerce to implement these particular controls, are the focus of much of this book.

Also incorporated in the 1979 Act are detailed prohibitions against the participation of "U.S. persons" in any boycott imposed by a foreign country against a country friendly to the United States which is not itself the object of any form of boycott imposed under U.S. law. While the so-called antiboycott legislation was first enacted in 1965 as an amendment to the Export Control Act of 1949, the original version was a simplified prohibition without specifics. Subsequently, the statute and the corollary Department of Commerce regulations were revised to identify in detail the various forms of compliance with foreign boycotts which were prohibited. The antiboycott regulations, which appear as 15 CFR 760, are analyzed in depth in this volume. The implications of boycott-related activities under the Securities Act of 1933 and the Sherman Antitrust Act are beyond the scope of this volume, however, and are not included in the discussion.

In formulating the Export Control Act of 1949, the United States government recognized that such controls could be effective only if parallel restrictions were adopted by other Western industrialized nations. Accordingly, discussions were initiated with Marshall Plan aid recipients, and an informal agreement was reached in 1950 to control the export of strategic products and related technical data from member countries. A multilateral organization was formed with a policy body, called the Consultative Group, to coordinate the respective national controls. A working body, the Coordinating Committee (COCOM), was assigned the responsibility for the day-to-day operations. The membership of this multilateral organization eventually included all the NATO countries (with the exception of Iceland) plus Japan and Australia. COCOM coordinated the determination of strategic items to be controlled, the review of

specific export transactions proposed by member governments for exception to the agreed international embargo, and the compliance activities of member states. The organization was disbanded March 31, 1994. A successor organization, called Wassenaar, continues to control most of the same items that had appeared on the COCOM list of strategic items. Wassenaar members include not only the old COCOM members but also Argentina, Austria, Bulgaria, Czech Republic, Finland, Hungary, Ireland, Poland, Romania, Russia, Slovakia, South Korea, Sweden, Switzerland, and Ukraine. Meanwhile, other multilateral organizations to deter the proliferation of nuclear, missile, and chemical and biological weapons have agreed on lists of items the export of which should be controlled for these reasons.

International export control regimes embrace not only commodities, software, and technologies having both civil and military uses (so-called "dual-use" items, controlled in the U.S. largely by the Department of Commerce), but also military equipment, software, and technologies. In the United States, exports of the latter — arms, ammunition, and implements of war — are regulated by the Office of Defense Trade Controls, U.S. Department of State. The International Traffic in Arms Regulations (ITAR) are promulgated pursuant to the authority granted to the Secretary of State by the Arms Export Control Act. These regulations — the controls themselves and the procedures for obtaining export licenses for commodities and technical data on the Munitions List — are dealt with in this volume.

Also discussed in this volume are the export controls administered by the Treasury Department and by several other agencies.

There should be no question in the mind of any exporter about the government's intention to enforce applicable legislation and regulations. The penalties provided by these laws and regulations are severe. Violations often lead to heavy fines, and, in serious cases, to imprisonment as well. Additionally, the privilege of exporting can be withdrawn from firms or individuals who have violated the regulations for specified periods or indefinitely. Ample resources are devoted by the government to the detection and prosecution of violators. The Department of Commerce, the Bureau of Customs, the Department of Justice, and the several intelligence agencies cooperate in this endeavor. Knowing and willful violations receive, of course, the heaviest sanctions, but unintentional violations are by no

means overlooked. Parties to an export transaction are expected to know and comply with the regulations.

With this background in mind, the arcane world of export regulations can now be visited. The purpose of this book is fundamental: to provide a reference to which exporters and those who work closely with them can refer in their daily business operations in order to comply with the myriad of export rules and regulations in as simple a manner as possible. Knowledge of the regulations can serve in the practical solution of export licensing problems related to specific transactions, in the formulation of export marketing plans designed to minimize the impact of controls, and in the organization of company resources to deal correctly and efficiently with both the legal requirements and day-to-day operational demands of the export control regulations.

The authors do not, of course, intend this book as a substitution for the statutes or regulations themselves. While every effort has been made in this edition to reflect all amendments to the relevant statutes and regulations through June 15, 2000, in the final analysis, the authoritative, binding rules are the statutes, the regulations, and interpretations of the regulations by the agencies and officials responsible for administering the laws.

This Fourth Edition revises substantially the 1991 Third Edition, as supplemented in 1992, 1993, 1994, 1995, and 1996.

However, affected parties must keep themselves currently informed of changes, especially those becoming effective subsequent to the June 15, 2000, cutoff date for this edition. The exporter is responsible for understanding the laws and regulations and determining how they affect his proposed transaction.

We would have preferred to await enactment of a new EAA. However, legislative action has remained pending for almost six years, indicating that the statutory basis for export controls may continue in limbo for a long time.

Additional Note Concerning the Revised Editions

The original title of the book was *Export Controls in the United States.* It was changed to *United States Export Controls* for the second edition and remains as it was in the Second Edition.

Chapter 1:
Overview

Chapter 1:
Overview

CHAPTER 1

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1.1 CONTROLS BY GOVERNMENT AGENCY

The U.S. Government has regulated exports in one way or another ever since the country was founded. During wartime, exports of virtually everything to virtually all destinations have been regulated, either to keep items from the enemy or because of short supplies at home. During peacetime, munitions have been controlled to all countries, total embargoes have been imposed on just a few countries, and non-munitions to non-embargoed countries have been controlled on a selective basis.

This chapter describes in general terms the controls administered by various U.S. Government agencies and how they relate to controls administered by other cooperating governments. Subsequent chapters describe in more detail Department of Commerce Bureau of Export Administration (BXA) controls on all transactions not regulated by another agency, Department of State Office of Defense Trade Controls (ODTC) controls on munitions, Department of the Treasury Office of Foreign Asset Controls (OFAC) controls on exports to specified destinations and certain transactions with nationals of those countries, and controls on hazardous exports administered by the Environmental Protection Agency (EPA), the Consumer Product Safety Commission (CPSC), and the Food and Drug Administration (FDA).

Table 1-1 indicates which chapters of this book are primarily relevant to which agency.

The Arms Export Control Act authorizes munitions controls, which are administered by the Department of State. These controls apply to both exports and temporary imports of defense articles.

OFAC in the Treasury Department administers virtually total embargoes and a few more selective controls. These were authorized by the 1917 Trading With the Enemy Act (TWEA) until that Act was largely superseded by the 1977 International Emergency Economic Powers Act (IEEPA). Current embargoes of North Korea and of Cuba and special Treasury controls of munitions and nuclear items to Cold War targeted countries are grandfathered under TWEA. Current OFAC embargoes of Libya, Iran, Iraq, Serbia less Kosovo, Sudan, and Taliban-controlled areas in Afghanistan and selective controls on exports to UNITA (Angola) are authorized by IEEPA.

The Bureau of Alcohol, Tobacco and Firearms, which is part of the Treasury Department, administers controls on permanent imports of munitions.

Most current selective controls of commercial items derive from actions taken before World War II to stop scrap metal shipments from going to Japan, where they were being used in the manufacture of munitions. These controls became much more extensive during World War II. The Cold War spawned selective controls under the Export Control Act of 1949. That statute eventually became the Export Administration Act of 1979, as amended (EAA). The EAA periodically expired before it was renewed. It last expired in 1994 and has not been renewed since then, although renewal is being considered again as this Fourth Edition goes to press in 2000. Substantially the same controls have been continued under IEEPA emergency legislative authority. Executive Orders direct compliance with the last version of the EAA to the extent permitted by law. The Department of Commerce administers these controls.

The Atomic Energy Act of 1954, as amended, authorizes nuclear controls. The Nuclear Regulatory Commission regulates nuclear commodities; the Department of Energy controls nuclear technology; and the Department of Commerce controls items that have both nuclear and non-nuclear applications.

Numerous other agencies administer controls on the export of the following narrowly defined items for which they have responsibilities under other legislation: natural gas and electric energy; narcotics and dangerous drugs; hazardous wastes, hazardous substances, toxic substances, insecticides, and pesticides; foods, drugs, and biological products and devices; tobacco seeds and plants; endangered fish and wildlife; and patent applications in a foreign country.

Questions often arise as to which agency has jurisdiction over a given export transaction. The most serious problems involve the Departments of State and Commerce. They are described as "Commodity Jurisdiction" issues, but they apply to technology and software as well as to commodities. Other jurisdictional questions are less apparent but pose potential problems.

Because of U.S. assertions of extraterritorial jurisdiction, *e.g.*, over reexports, problems often arise as to whether the United States or a foreign country is responsible for regulating a particular transaction.

Table 1-2 summarizes what each agency controls and cites the statutory authority and the regulations for these controls.

State munitions controls are known as the International Traffic in Arms Regulations (ITAR). State visa controls refer to the policy of the Department of State to deny visas to foreign travellers intending to acquire controlled technology illegally.

OFAC administers controls affecting exports to the destinations listed in Table 1-2. The previously "COCOM-proscribed" destinations still affected by OFAC regulations are: Albania, Bulgaria, Cambodia (even though never COCOM-proscribed), Czech Republic, Estonia, Latvia, Lithuania, North Korea, Mongolia, People's Republic of China, Poland, Romania, Slovak Republic, the geographic area formerly known as the Union of Soviet Socialist Republics, and Vietnam. Exports to these destinations require an OFAC license if they are:

- From overseas subsidiaries of U.S. firms.
- From a country not a member of, or cooperator with, the former COCOM, namely, NATO countries except Iceland plus Japan and Australia, as former COCOM members, and Austria, Finland, Hong Kong, Ireland, New Zealand, Sweden, and Switzerland, as cooperators.
- Merchandise controlled by the Arms Export Control Act or the Atomic Energy Act.

OFAC also administers other controls that indirectly affect exports. OFAC blocks assets of Serbia and Montenegro,[1] terrorists,[2] narcotics traffickers centered in Colombia,[3] foreign terrorist organizations,[4] and Sudan.[5] OFAC prohibits new investment in Burma by, or facilitated by, U.S. persons.[6] OFAC restricts imports with respect to the proliferation of weapons of mass destruction.[7]

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[1] 31 C.F.R. §§ 585 and 586.
[2] 31 C.F.R. § 595.
[3] 31 C.F.R. § 536.
[4] 31 C.F.R. § 597.
[5] 31 C.F.R. § 528.
[6] 31 C.F.R. § 537.
[7] 31 C.F.R. § 539.

Treasury's Bureau of Alcohol, Tobacco and Firearms (BATF) regulates munitions imports, which indirectly affect munitions exports.

Nuclear Regulatory Commission (NRC) controls apply to:

- Nuclear reactors and parts and components.
- Plants for isotope separation, reprocessing irradiated fuel elements, fabrication of nuclear reactor fuel elements, and production of heavy water, and parts and components.
- Special nuclear material, source material, byproduct material, deuterium, and nuclear grade graphite.

The Department of Energy (DOE) controls "Restricted Data," which concern design, manufacturing, or utilization of atomic weapons; production of special nuclear material; or use of special nuclear material in the production of energy. DOE also controls "sensitive nuclear technology," which concerns a uranium enrichment or nuclear fuel reprocessing facility or a facility for the production of heavy water.

EPA administers three separate export controls concerning hazardous wastes, toxic substances, and pesticides. CPSC administers controls on the export of consumer products not in conformity with an applicable safety standard or declared to be a banned hazardous substance. FDA administers controls on drugs and biological products.[8]

Classified information is controlled pursuant to Executive Order 12,356 of April 6, 1982. "Scientific, technological, or economic matters relating to the national security" is one of ten classification categories in that Order.

Government contracts sometimes contain restrictions that have the effect of controlling exports, *e.g.*, provisions for pre-publication review of research results.

1.2 OVERLAPPING AGENCY JURISDICTION

There is considerable overlapping jurisdiction among U.S. Government agencies. However, in some instances, what appears

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[8] For details on EPA, CPSC, and FDA controls, see Chapter 9 *infra*.

to be a jurisdictional conflict is not in fact and, in other instances, the two agencies have agreed that one will defer to the other.

The following analysis is in the order of the agencies as they appear in Table 1-2, except that an overlap is not discussed a second time under the second agency. Commerce is listed last in Table 1-2 because Commerce controls what other agencies do not control. Thus, all overlaps with Commerce are discussed under the other agency.

1.2.1 State Munitions

State munitions controls overlap Treasury OFAC, NRC, Energy, classification, contractual, and Commerce controls.

1.2.1.1 State Munitions vs. Treasury OFAC

OFAC regulates the export to specified rogue states of munitions items which are subject to State jurisdiction. OFAC also regulates exports arranged by persons in the United States of these same munitions items from a foreign country to former COCOM-proscribed countries plus Cambodia. OFAC controls non-U.S.-origin items from foreign countries, whereas State does not. However, there is overlapping jurisdiction for exports from the United States and for reexports of U.S.-origin items from foreign countries.

There is no OFAC deferral to State nor any State deferral to OFAC to indicate which agency will exercise jurisdiction in this area of overlap. Problems of concurrent jurisdiction do not arise with respect to countries to which both agencies deny exports. For example, State has established a policy of denial in 22 C.F.R. § 126.1 to North Korea, Cuba, Iraq, UNITA (Angola), Libya, Iran, Sudan, Serbia, Afghanistan, and the following countries proscribed by Treasury Transaction Controls: People's Republic of China, Armenia, Azerbaijan, Belarus, and Tajikistan. However, the following countries subject to Treasury Transaction Controls are not included in 22 C.F.R. § 126.1: Albania, Bulgaria, Cambodia, the Czech Republic, Estonia, Latvia, Lithuania, Mongolia, Poland, Romania, the Slovak Republic, Vietnam, and the following portions of the geographic area formerly known as the USSR: Georgia, Kazakhstan, Kyrgyzstan, Moldova, Russia, Turkmenistan, Ukraine, and Uzbekistan.

Brokering activities regulated by State[9] overlap OFAC controls.[10]

It appears that approval of both agencies is required in these areas of concurrent jurisdiction.

1.2.1.2 State Munitions vs. NRC and Energy

ITAR Munitions List coverage of naval nuclear propulsion plants, nuclear weapons design and test equipment, and related technical data[11] appear to overlap NRC and Energy controls. However, State defers to NRC and Energy with respect to naval nuclear propulsion or nuclear weapons design and test equipment under NRC or Energy export control[12] and State defers to Energy concerning nuclear Restricted Data or data removed from the Restricted Data category by Energy.[13]

Both State and Energy appear to have jurisdiction over naval nuclear propulsion technical data and sensitive nuclear technology other than Restricted Data. But State will not grant a license for naval nuclear propulsion technical data except pursuant to a cooperation agreement concluded pursuant to the Atomic Energy Act.[14] Energy negotiates such agreements, *e.g.*, with the United Kingdom. State may also defer to Energy in cases involving "sensitive nuclear technology."

1.2.1.3 State Munitions vs. Classification

State controls the export of all articles classified in the interests of national security and all classified information relating to defense articles and defense services,[15] except for Restricted Data controlled by Energy. Information relating to defense articles and defense services is subject to State jurisdiction even if not classified.

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[9] Described in 22 C.F.R. §§ 129.2(b) and 129.5(b).

[10] This is because OFAC controls financial transactions related to exports to the following countries referred to in 22 C.F.R. § 126.1: North Korea, Cuba, Libya, Iran, Iraq, Sudan and UNITA (Angola).

[11] 22 C.F.R. § 121.1 Categories VI(e), VI(g), and XVI.

[12] 22 C.F.R. § 123.20(a).

[13] 22 U.S.C. § 2403(e).

[14] 22 C.F.R. § 123.20(b).

[15] 22 C.F.R. §§ 120.10(2) and 121.1 Category XVII.

1.2.1.4 State Munitions vs. Contracts

Data otherwise subject to ITAR controls is excepted from ITAR licensing requirements if "approved for public release" under the terms of a government contract.[16]

1.2.1.5 State Munitions vs. Commerce BXA

Generally, if an item is subject to State jurisdiction, it is not subject to Commerce jurisdiction, although Commerce does not recognize this in all instances. Generally, if State excludes an item from its jurisdiction, it becomes subject to Commerce jurisdiction, although some such items are removed from the jurisdiction of all U.S. Government agencies. Some items are explicitly subject to the jurisdiction of both agencies. Occasionally items are formally transferred from State to Commerce or from Commerce back to State. Jurisdictional confusion has led to inconclusive Congressional efforts to clarify the situation.

1.2.1.5.1 If Munitions, then Not Commerce BXA

If an article or service is on the U.S. Munitions List, State considers that its export is regulated exclusively by State, rather than by Commerce.[17] Commerce prohibits exports with specified exceptions, one of which is items controlled "exclusively" by another listed U.S. Government agency.[18] The first entry in that list is the Department of State. The word "exclusively" robs this Commerce statement of any assistance in resolving jurisdictional disputes.

In case of doubt as to whether State or Commerce has jurisdiction, "Upon written request, the Office of Defense Trade Controls shall provide a determination of whether a particular article or service is covered by the U.S. Munitions List" under a "commodity jurisdiction procedure" which "entails consultations among the Departments of State, Defense, Commerce and other U.S. Government agencies and industry in appropriate cases."[19]

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[16] 22 C.F.R. § 125.4(b)(13).
[17] 22 C.F.R. § 120.4.
[18] 15 C.F.R. § 734.3(b)(1).
[19] 22 C.F.R. § 120.4.

At present, the Commerce Control List (CCL), in order to conform with the European Union control list, includes many items which are under State, rather than Commerce, jurisdiction. These are explicitly identified on the CCL as being under State jurisdiction. However, for several of these items the extent of the intended deferral is considerably less than indicated literally on the CCL. This is because State objected to Commerce including on the CCL detailed descriptions of what State controls. The most confusing aspect of these explicit Commerce deferrals is that "missile" production equipment is shown as State jurisdiction whereas the broader term "munitions" production equipment is shown as Commerce jurisdiction.[20]

When Commerce removes specific entries from its control list, it sometimes cautions that items within deleted entries may be subject to ITAR.[21]

Brokering activities which, if pertaining to missiles, require prior written approval by State[22] overlap Commerce controls. This is because Commerce controls any service that will directly assist in the design, development, production, or use of missiles.[23] Even in the absence of a deferral from Commerce to State, it is probable that State would assert exclusive jurisdiction in this area of concurrent jurisdiction, but it is possible that both agencies would require a license for the same transaction.

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[20] The details of Commerce deferrals to State are shown in Appendix 1-1, which adds missing details and identifies the various items related to the production equipment anomaly.

[21] This was done when commercial communications satellites were transferred from Commerce back to State jurisdiction on March 15, 1999. The February 28, 1989, Federal Register notification of deletion of the following items from the CCL, in order to comply with a statutory requirement to remove unilateral national security items, contained such a caveat:

- 5406A Non-magnetic diesel engines.
- 4431B Maritime propulsion steam turbines.
- 5431C Compressors/blowers for military/naval use.
- 5510C Doppler sonar navigation equipment.
- 4516B Communications countermeasures equipment.
- 5568C Specified electrical equipment.
- 4601B Aircraft landing mats.

[22] 22 C.F.R. § 129.2(b) and 129.7(a)(1)(v).

[23] 15 C.F.R. § 744.6(a)(2)(i).

1.2.1.5.2 If Not Munitions, then Commerce BXA

On the other hand, State explicitly excludes from its jurisdiction the following items which appear on the Commerce Control List:

In ECCNs:

- Cargo, trainer, utility, liaison, and observation aircraft.[24]
- Developmental aircraft, engines, and components when actually applied commercially.[25]
- Non-combat shotguns barrel length 18 inches or over.[26]
- Standard military helmets.[27]

In EAR99 "not elsewhere specified":

- Demolition blocks and blasting caps.[28]
- Military aircraft reciprocating engines.[29]
- Fixed land-based arresting gear for launching and recovery of aircraft or spacecraft.[30]
- Aircraft tires and propellors used with reciprocating engines.[31]

Exclusions for commercial use covered by ECCNs, EAR99, or both:

- Pyrotechnic materials having dual military and commercial use.[32]
- Components "in normal commercial use" for electronic, fire control, lasers, night-sighting, and inertial equipment.[33]

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[24] 22 C.F.R. § 121.3 and ECCNs 9A018.a and 9A991.a and 15 C.F.R. § 770.2 (i)(2) Interpretation 9.

[25] 22 C.F.R. § 121.1 Category VIII(f) and ECCN 9A991.a.

[26] 22 C.F.R. § 121.9(a) and ECCN 0A984.

[27] 22 C.F.R. § 121.1 Category X(a) and ECCN 0A988.

[28] 22 C.F.R. § 121.1 Category IV(a) and 22 C.F.R. § 121.1.

[29] 22 C.F.R. § 121.1 Category VIII(b) and 15 C.F.R. § 770.2(i)(3) Interpretation 9.

[30] 22 C.F.R. § 121.1 Category VIII(d).

[31] 22 C.F.R. § 121.1 Category VIII(h) and 15 C.F.R. § 770.2(i)(5,6) Interpretation 9.

[32] 22 C.F.R. § 121.1 Category V(d).

[33] 22 C.F.R. § 121.1 Categories XI(c) and XII(e).

Commerce controls applying to commodities, software, and technology used directly or indirectly in specified nuclear, missile, or chemical or biological warfare activities[34] go far beyond State controls.

1.2.1.5.3 Both Munitions and Commerce BXA

There are two different sets of statutory definitions of "defense article" and "defense service," one for government sales and one for commercial exports. The former includes any implement of war, any commodity used in making military sales, any item for the production or use of any such article, any component of such article, and related services.[35] The latter is "those items designated by the President."[36] The U.S. Munitions List consists of the items designated by the President. That list is narrower than the statutory definitions of "defense article" and "defense service" for Government sales in one respect but broader in another.

The Munitions List is narrower than the definitions for Government sales (called Foreign Military Sales or FMS), because it excludes most items used for production and generally limits components to those that are specially designed for the listed product. It is not clear whether State or Commerce has jurisdiction over FMS items not on the Munitions List. However, even if such FMS items were to be under State jurisdiction when part of an FMS transaction, they are under Commerce jurisdiction if not part of an FMS transaction.

On the other hand, the Munitions List is broader than the FMS definitions because it includes civil items such as non-military communications satellites. China sanctions legislation excluded civil aircraft inertial navigation systems from the mandatory continuation of suspension of licenses of defense articles.[37]

There are many instances where the same item appears on both the Commerce List and the State List, some of which are civil and some military.

There is no specific guidance in either State or Commerce regulations to resolve such instances of concurrent coverage. State asserts

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[34] 15 C.F.R. § 744.

[35] 22 U.S.C. § 2794(3) and (4).

[36] 22 U.S.C. § 2794(7).

[37] See Chapter 2 *infra* for a further discussion of these sanctions.

that it has final authority in commodity jurisdiction disputes.[38] This implies that State has jurisdiction for any item described on the U.S. Munitions List. However, a State regulation limits future designation of a defense article or a defense service to items "specifically designed . . . or modified for a military application" that do not have predominant civil applications and do not have form, fit, and function for civil applications or have significant military or intelligence applicability.[39] There have been informal, unrebutted statements in a Technical Advisory Committee that this State regulation removes from State jurisdiction some items that appear, literally, to be on the U.S. Munitions List, such as chemical and biological agents which also appear on the Commerce Control List.

Commerce regulations are also ambiguous concerning commodity jurisdiction issues. The removal from Commerce jurisdiction of only those items that are "exclusively" controlled by other agencies[40] leaves in doubt which agency has jurisdiction for items listed by both State and Commerce.

In the early 1990s, State took actions designed to "remove from the U.S. Munitions List all items contained on the COCOM dual-use list unless significant U.S. national security interests would be jeopardized."[41] However, many State-Commerce overlaps continue. These are described in detail in Appendix 1-2.

If Commerce issues a license for an item under State jurisdiction, State does not recognize the validity of the Commerce license but insists that a State license also be issued to authorize the export.

1.2.1.5.4 Transfers from State to Commerce BXA

State must "periodically" review items on the U.S. Munitions List and include, in reports to Congress required 30 days before removal of any items from that list, a description of any controls to be imposed on such items by Commerce.[42] State moved specified imaging systems, focal plane arrays, image intensification

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[38] 22 C.F.R. § 120.4.

[39] 22 C.F.R. § 120.3.

[40] 15 C.F.R. § 734.3(b)(1).

[41] Federal Register notices dated Apr. 17, 1992, Sept. 10, 1993, and Sept. 9, 1994, to implement the President's Nov. 16, 1990, directive.

[42] 22 U.S.C. § 2778(f).

tubes, inertial navigation systems, communications satellites, an international space station, hot section technologies for commercial aircraft engines, and commercial communications satellites to the licensing jurisdiction of the Department of Commerce upon establishment by Commerce of special foreign policy controls.[43] Subsequently, Congress mandated the return to State jurisdiction of commercial communications satellites.[44]

1.2.1.5.5 Congressional Clarification Efforts

The bill to extend and amend the Export Administration Act, which the President vetoed for other reasons in November 1990, would have required that:

- No item be controlled by both Commerce and State.
- Items on the COCOM International Munitions List (IML) be controlled by State.
- Items not on the IML be controlled by Commerce, except for a transition period to permit U.S. proposals to COCOM to add to the IML any item that is specially designed for military or intelligence application but does not have identifiable civil applications and is not a component essentially equivalent to components used for civil applications.

Appendix 1-3 shows how, in the authors' opinion, the State and Commerce control lists would be changed if guidance in the 1990 bill were to be followed, substituting Wassenaar for COCOM. There are many items on the State List which are not on the Wassenaar Munitions List (WML), including some that are not on the Wassenaar Dual-Use List (WDUL) either. There are also several items on the Commerce List that are on the WML and some which Wassenaar does not control at all. It is assumed that Commerce would control the few items on the WML that are not designed for military purposes.

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[43] On Apr. 27, 1992, Sept. 10, 1993, Sept. 9, 1994, Sept. 19, 1994, Nov. 5, 1996, and Apr. 9, 1998, respectively.

[44] Pub. L. No. 105-261 was implemented by Commerce and State regulatory revisions effective Mar. 15, 1999.

1.2.2 State Visa Controls vs. Export Controls

Whether State denies or issues a visa has no effect on the continued validity of export controls on the transfer of technical data to the visa applicant. This is true regardless of whether the export controls are administered by State, Commerce, or any other agency.

Thus, if a foreigner's visa application is reviewed from the standpoint of the risk of unauthorized transfer of technical data to him, separate authorization would be required under the technical data regulations of the appropriate agency administering export controls even if the visa were issued.

1.2.3 Treasury OFAC

Treasury OFAC controls overlap Energy, NRC, and Commerce BXA controls.

1.2.3.1 Treasury OFAC vs. Energy and NRC

OFAC Transaction Controls on exports to former-COCOM-proscribed destinations plus Cambodia apply to merchandise for which unauthorized exportation from the United States is prohibited by regulations issued under the Atomic Energy Act of 1954. This includes Nuclear Regulatory Commission regulations in 10 C.F.R. § 110 and Department of Energy regulations in 10 C.F.R. § 810.

This is the only recognition in OFAC regulations of NRC or Energy controls. The NRC and Energy regulations do not recognize OFAC controls at all. Accordingly, an OFAC license would apparently be required for any reexport arranged by a U.S. person to an OFAC-controlled destination even if NRC or Energy had already licensed the transaction.

Also see Chapter 3 concerning OFAC's probably inadvertent decontrol of non-U.S.-origin nuclear data of a type controlled by Energy if of U.S.-origin.

1.2.3.2 Treasury OFAC vs. Commerce BXA

BXA and OFAC have concurrent jurisdiction to control exports of items on the Commerce Control List. However, the two agencies have attempted to avoid requiring licenses from both for the same

transaction. OFAC defers to BXA licenses for exports controlled pursuant to the EAA to North Korea,[45] Cuba,[46] or Serbia,[47] whereas BXA defers to OFAC licenses for exports to Iraq, Libya, Iran, or UNITA (Angola).[48] But each agency administers some types of controls on exports to countries for which it has made general deferrals to the other.

OFAC administers controls on exports by persons subject to U.S. jurisdiction of non-U.S.-origin items from a foreign country to North Korea, Cuba, Iraq, or Sudan. The similar control to Iran is limited to items that were under BXA control prior to the reimposition of Iranian sanctions in 1995. The EAA was amended in 1977 to give Commerce authority to control such exports; but Commerce elected not to seek transfer of jurisdiction from Treasury. Commerce may have abandoned any thought it might have had to use that authority for this purpose because of allied criticism in the early 1980s of similar Commerce controls on equipment for a natural gas pipeline from the USSR. That explicit Commerce authority lapsed when the EAA expired in 1994.

BXA administers controls on reexports of U.S.-origin items to countries subject to OFAC embargoes, unless the intended reexport was known before the item departed the United States, in which case OFAC would call the transaction a transshipment. OFAC transshipment controls to Libya are waived if the U.S.-origin goods are substantially transformed in a third country unless they are for use in Libya's petroleum or petrochemical industry. The regulations are silent as to which agency controls reexports of U.S.-origin items by persons subject to U.S. jurisdiction to Iraq, Iran, or Sudan.

For North Korea but not for Cuba, OFAC defers to BXA for License Exception GFT and for permitting shipments of foreign-made items with 10 percent or less U.S. content. OFAC authorizes exports to Libya qualifying for BXA License Exceptions BAG, GOV, and GFT and for the exclusion from control of publicly available technology.[49] OFAC authorizes exports to Iraq qualifying for BXA License Exceptions BAG and GOV.[50] The

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[45] 31 C.F.R. § 500.533.
[46] 31 C.F.R. § 515.533.
[47] 31 C.F.R. § 586.
[48] 15 C.F.R. §§ 746.3(a), 746.4(a), 746.7 Intro., and 746 Supp. 1.
[49] 31 C.F.R. § 550.504, 15 C.F.R. § 746.4(b)(1), 15 C.F.R. § 734.3(b)(3).
[50] 31 C.F.R. § 575.507(a)(1), 15 C.F.R. § 746.3(a)(1).

OFAC authorization for accompanied baggage to Iran[51] is similar, but not identical, to BXA License Exception BAG.

Transaction Controls affect exports arranged by a person within the United States from a foreign country to a former COCOM-proscribed destination plus Cambodia.[52] In 1995, the applicability of these Treasury controls was removed from items included in the Commerce Control List coded "A," *i.e.*, COCOM (now Wassenaar) items controlled for national security purposes. Transaction Controls remain in effect for items regulated under the Atomic Energy Act. It may have been intended to limit this provision to nuclear items controlled by the Nuclear Regulatory Commission or the Department of Energy. However, BXA controls of dual-use items having nuclear uses are mandated by section 309(c) of the Nuclear Non-Proliferation Act of 1978, which amended the Atomic Energy Act of 1954. If Transaction Controls are intended to apply to Commerce Control List items controlled for nuclear reasons, there is no regulatory guidance as to whether a license from both agencies would be required for reexport of U.S.-origin items arranged by a U.S. person or, if not, which agency's license would govern.

OFAC permits reexports to Sudan only if they are incorporated in a foreign item and constitute less than 10 percent of the value of that item or are substantially transformed.[53] If these tests are not met, there appears to be concurrent OFAC and BXA jurisdiction, with no guidance as to which agency has priority. OFAC authorizes reexports to Sudan by non-U.S. persons of U.S.-origin items not subject to export license application requirements under other U.S. regulations but notes that items classified EAR99 under the EAR may require Commerce authorization. The only BXA license requirement to Sudan for EAR99 items is in connection with part 744 end-use or end-user controls.

As of January 1, 2000, neither OFAC nor BXA had published regulations implementing the embargo on exports to Taliban-controlled areas of Afghanistan.

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[51] 31 C.F.R. § 560.507.
[52] 31 C.F.R. § 505.
[53] 31 C.F.R. § 538.507.a.

1.2.3.3 Treasury OFAC vs. Patent Office

Treasury authorizes transactions related to the registration and renewal in the Patent and Trademark Office or the U.S. Copyright Office of patents, trademarks, and copyrights in which the Cuban Government or a national of Cuba has an interest.[54] OFAC authorizes Iranian and Sudanese transactions in connection with patent, trademark, copyright, or other intellectual property protection in the United States, Iran, or Sudan.[55]

1.2.4 Nuclear Regulatory Commission

NRC controls are closely related to those of Energy, EPA, and Commerce BXA.

1.2.4.1 NRC vs. Energy

Energy has jurisdiction over retransfers of items for which the original export is regulated by NRC.[56]

1.2.4.2 NRC vs. EPA

A NRC license is required for the export of nuclear hazardous waste. This is in addition to the notification of intent to export and the consent of the government of the importing country required by EPA under RCRA.

1.2.4.3 NRC vs. Commerce BXA

BXA defers to NRC for reactor or plant components that relate to a reactor or a plant that is the subject of a license application to NRC, even if the components are shipped separately. This includes components such as a computer specially designed for a reactor. However, NRC defers to Commerce for items, such as a computer in a reactor, which might otherwise be considered eligible for a NRC general license.[57]

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[54] 31 C.F.R. § 515.527.
[55] 31 C.F.R. § 560.509 and 31 C.F.R. § 538.514.
[56] 10 C.F.R. § 110.6.
[57] 10 C.F.R. § 110.20(c).

BXA controls applying to "any other" commodity for facilities specified in NRC controls clearly go beyond the NRC controls, which are limited to specified or specially designed components.[58]

1.2.5 Energy

Department of Energy controls are closely related to classification and Commerce BXA controls.

1.2.5.1 Energy vs. Classification

"Restricted Data," which is born classified under the Atomic Energy Act, is controlled until the Department of Energy has determined that they "can be published without undue risk to the common defense and security."[59]

1.2.5.2 Energy vs. Commerce BXA

BXA regulations contain Energy controls on nuclear technology, at Energy's request, to make sure they are not overlooked.[60]

BXA defers to State or Energy for commodities or technology related to nuclear weapons or explosives;[61] but State excludes from its jurisdiction nuclear weapons test items in normal commercial use for other purposes.[62]

BXA controls applying to any item for nuclear explosive devices and to specified nuclear activities go beyond Energy controls.[63] For example, "Restricted Data" excludes what Energy has declassified and "sensitive nuclear technology" is limited to "important" information.

There is no regulatory language indicating how, if at all, Commerce controls on maritime nuclear propulsion technology[64] go beyond State and Energy controls.

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[58] 10 C.F.R. § 110.8 and 15 C.F.R. §§ 744.2(a) and 744.6(a)(1)(i)(A).
[59] 42 U.S.C. §§ 2014(y), 2161, and 2162.
[60] 15 C.F.R. §§ 744.2(a) and 744.6(a)(1)(i)(A).
[61] 15 C.F.R. § 744.2(a)(1) n.2.
[62] 22 C.F.R. § 121 Category XVI(b).
[63] 15 C.F.R. §§ 744.2 and 744.6(a)(1)(i)(A) and (a)(1)(ii).
[64] 15 C.F.R. § 744.5.

1.2.6 EPA or CPSC vs. Commerce BXA

A notification of intent to export or an acknowledgement from the importer that a product will not be sold in the United States, which may be required by EPA or CPSC, apparently does not waive the applicability of Commerce regulations, under which a license might be required, depending on the product and the export destination. One deduces this from the omission of EPA or CPSC controls from the Commerce list of other agency controls excluded from "subject to the EAR."[65] However, BXA requires a license for most, if not all, such products only to North Korea, Cuba, and Libya (or pursuant to "catch-all" end-user or end-use controls).

1.2.7 Patent Office vs. Commerce BXA

The Bureau of Export Administration (BXA) in the Department of Commerce has delegated authority to the Patent and Trademark Office (PTO), also in the Department of Commerce, to approve exports and reexports of technology in a patent application for filing in a foreign country.[66] Although such technology not approved under PTO regulations must comply with the EAR,[67] this technology is removed from "subject to the EAR."[68] Also excluded from "subject to the EAR" are information contained in a patent application prepared wholly from foreign-origin technical data being sent to the foreign inventor to be executed and returned to the United States for subsequent filing in the U.S. Patent and Trademark Office and information sent to a foreign country to obtain the signature of an inventor.[69]

1.2.8 Classification vs. Agency Controls

Classified information relating to defense articles and defense services is subject to State jurisdiction even if the classification is initiated by another agency. Classified articles are subject to State

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[65] 15 C.F.R. § 734.3(b)(1).
[66] 15 C.F.R. § 734.3(b)(1)(v) and 37 C.F.R. pt. 5.
[67] 15 C.F.R. § 734.3(b)(1)(v) last sentence.
[68] 15 C.F.R. §§ 734.3(b)(3)(iv) and 734.10(b).
[69] 15 C.F.R. §§ 734.3(b)(3)(iv) and 734.10(a) and (c).

jurisdiction even if the article would otherwise be subject to the jurisdiction of another agency.

As noted above, State appears to defer, *de facto*, to Energy for controls on classified as well as unclassified "sensitive nuclear technology" and naval nuclear propulsion technical data.

Commerce BXA does not assert a control on commodities, software, or technology just because they are classified. Items described on the Commerce Control List include classified as well as unclassified versions. However, some of the classified versions are not under Commerce jurisdiction. Classified technical data relating to defense articles and defense services and all classified articles that would otherwise be subject to Commerce jurisdiction are subject to State jurisdiction. This is true regardless of the agency that classifies them. Classified software or technology not relating to defense articles and defense services and not controlled by Energy, PTO, or some other agency are subject to Commerce BXA controls and would be "subject to the EAR" (unless they are *de minimis* content in a foreign item), since they are not publicly available.

1.2.9 Contracts vs. Agency Controls

Lack of a government contract restriction does not waive the applicability of other export controls on technical data developed under that contract. However, such data may be excepted from ITAR licensing requirements by Government action under the contract[70] or may qualify for exclusion from "subject to the EAR" because of being publicly available.[71]

1.3 INTERNATIONAL OVERLAPPING JURISDICTION

U.S. assertion of jurisdiction over reexports of U.S.-origin items, exports of foreign-made products with U.S.-origin parts or based on U.S.-origin technology or software, and exports of non-U.S.-origin items by overseas subsidiaries of U.S. firms conflicts with the exercise by other countries of jurisdiction over exports from their territories. The extent to which the United States asserts such jurisdiction varies by agency and by country.

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[70] See section 1.2.1.4 *supra.*

[71] 15 C.F.R. § 734.3(b)(3).

1.4 TRANSACTION TYPES

The word "export" has many different meanings. The most common is actual transmission from the United States to a foreign country. The United States regulates not only transmissions out of the country but also many other types of transactions, as follows:

- Actual transmission from the United States to a foreign country.
- Transfers within the United States, including release of technology to a foreign person.
- Reexports of U.S.-origin items from one foreign country to another.
- Retransfers within foreign countries, including release of technology to a foreign person.
- Exports from foreign countries of foreign-made items with U.S.-origin content.
- Exports from one foreign country to another foreign country of foreign-made items which are the direct product of U.S.-origin technology.
- Exports of non-U.S.-origin from one foreign country to another foreign country by persons subject to U.S. jurisdiction.
- Travel to the United States of foreigners desiring to obtain U.S. technology.
- Cooperation by a U.S. person in a foreign boycott of another foreign country.
- Activity in support of an export transaction.
- Activity unrelated to an export but related to the proliferation of a missile or chemical or biological weapon capability.

This book does not, in general, address the regulation of imports. However, it does discuss:

- Temporary imports into the United States, followed by an export.
- Temporary exports from the United States, followed by an import.
- The permanent import of munitions, which is regulated by the Treasury Department's Bureau of Alcohol, Tobacco and Firearms.

Table 1-3 describes the range of activities regulated by U.S. export controls. Table 1-4 describes the portions of these transaction

types for which no U.S. agency exercises jurisdiction. Table 1-5 lists agencies-exercising jurisdiction for each type, for the portions for which jurisdiction is exercised.

1.4.1 Uncontrolled Transactions

Transactions subject to no U.S. controls are, for the most part, described in Commerce regulations, since Commerce controls what other agencies do not control. However, as indicated in Table 1-5, State and Treasury regulations also provide guidance.

1.4.1.1 Canada

Most exports to Canada are uncontrolled. However, Commerce and State impose a few license requirements involving Canada, as follows:

- Commerce requires a license for export to Canada of:
  —Short supply commodities.[72]
  —End-user and end-use and other activity controls.[73]
  —Implements of torture.[74]
  —Communications intercept devices.[75]
- State requires a license for export to Canada of:[76]
  —Firearms and ammunition.
  —Launch vehicles, missiles, and rockets other than bombs, grenades, torpedoes, depth charges, and land and naval mines.
  —Nuclear weapons delivery systems.
  —Nuclear design and test equipment.
  —Naval nuclear propulsion equipment.
  —Aircraft.
  —Military information security systems.
  —Spacecraft.
  —Nuclear weapons design and test equipment.
  —Classified articles, technical data, and defense services.

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[72] 15 C.F.R. § 754.
[73] 15 C.F.R. § 744.
[74] 15 C.F.R. § 742.11(a) and 15 C.F.R. § 774 ECCN 0A983.
[75] 15 C.F.R. § 742.13 and 15 C.F.R. § 774 ECCN 5A980.
[76] 22 C.F.R. § 126.5(b-e).

—Submersible and oceanographic vessels.
—U.S. Munitions List items and related technical data on the Missile Technology Control Regime Annex.
—Defense articles, defense services, or related technical data for use by a foreign national other than a Canadian citizen.
—Defense services.
—Any export for which Congressional notification is required.

1.4.1.2 U.S. Government Agency

Shipments for personal or official use of U.S. Government personnel and agencies are eligible for Commerce License Exception GOV.[77]

State does not control exports for end-use by an agency of the U.S. Government if the export is pursuant to a contract with, or written direction by, a U.S. Government agency.[78]

1.4.1.3 In-Transit Through United States

Commerce does not control shipments in-transit through the United States if they are eligible for the "items temporarily in the United States" portion of License Exception TMP.[79]

State requires a license for "in-transit" shipments of items temporarily imported into the United States for overhaul, repair, or other purposes.[80] However, shipments originating in Canada or Mexico transiting the United States enroute to the country of origin do not require a State license.[81]

1.4.1.4 Transfers Within the United States

Commerce regulations do not explicitly control transfers within the United States of commodities to anybody or of technology or software to U.S. nationals or to foreign nationals who are admitted for permanent residence in the United States or who are protected individuals under the Immigration and Naturalization

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[77] 15 C.F.R. § 740.11(b)(2)(i,ii).
[78] 22 C.F.R. § 126.4.
[79] 15 C.F.R. § 740.9(b).
[80] 22 C.F.R. § 123.3.
[81] 22 C.F.R. § 123.19.

Act.[82] However, Commerce regulations do prohibit any transaction with intent to evade controls.[83]

Commerce does not require a license from the United States to Puerto Rico or to any U.S. territory, dependency, or possession listed in Census regulations.[84] State regulations are similar.[85]

State includes in its definition of "export":[86]

- Transferring registration or control to a foreign person of any aircraft, vessel, or satellite on the United States Munitions List, whether in the United States or abroad.
- Disclosing or transferring technical data to a foreign person, whether in the United States or abroad.

There are several anomalies in State regulations concerning the definition of "foreign person."[87]

1.4.1.5 Reexports Without Foreign Changes

The U.S.-origin items for which Commerce does not control reexports to Canada are those for which Commerce does not control exports to Canada.

Commerce does not control reexports of U.S.-origin commodities to and among former-COCOM participating countries, Austria, Finland, Hong Kong, Ireland, South Korea, New Zealand, Sweden, or Switzerland, provided they are neither a computer exceeding 10,000 mtops nor controlled for nuclear or missile reasons.[88]

Commerce does not control reexports of U.S.-origin commodities controlled for national security reasons from these same countries, provided they meet the following conditions:[89]

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[82] 8 U.S.C. § 13246(a)(3).
[83] 15 C.F.R. § 764.2(h).
[84] 15 C.F.R. § 734.2(b)(8).
[85] 22 C.F.R. § 123.12; but see App. 2-1: 8b *infra*.
[86] 22 C.F.R. § 120.17.
[87] See App. 2-1: 9a-d *infra*.
[88] 15 C.F.R. § 740.16(b).
[89] 15 C.F.R. § 740.16(a).

- Authorized by former-COCOM participating countries, Austria, Finland, Hong Kong, Ireland, South Korea, New Zealand, Sweden, or Switzerland.
- Not subject to nuclear, chemical, biological, missile, significant item, or crime control export controls.

Either:

- To a former COCOM-proscribed destination or
- To a country not embargoed, not formerly COCOM-proscribed, and not controlled for nuclear, chemical and biological or missile reasons, provided a license is not required to a former COCOM member country.

There are no comparable present or proposed State exemptions from requirements for commodity reexport authorization.

An application for a State license for "significant military equipment" must be accompanied by a Non-Transfer and Use Certificate. Such a certificate may also be required for the export of any other defense articles or defense services.

1.4.1.6 U.S. Content in Foreign Item

Commerce does not control reexports of U.S.-origin content in a foreign-made item, other than a computer exceeding 12,300 mtops to Computer Tier 3 or 4 countries or encryption items, spacecraft, technology or source code to produce foreign-made commodities, or specified aircraft technology to any destination, if:

- Either the foreign-made item or the U.S. content could be exported from the United States to the new destination under a License Exception or no license required provision for that destination.
- The U.S. content value is 10 percent or less to an embargoed country or a terrorist-supporting country (North Korea, Cuba, Libya, Iran, Iraq, Syria, Sudan, Serbia less Kosovo, or Taliban-controlled areas in Afghanistan).
- The U.S. content value is 25 percent or less to a non-embargoed non-terrorist-supporting country.

There is no comparable State lack of control for *de minimis* U.S. content in foreign items.

1.4.1.7 Foreign Product Based on U.S. Technology or Software

The only Commerce controls of the reexport of the direct product of U.S.-origin technology or software are limited to exports to former COCOM-proscribed destinations plus Cuba and to products controlled for national security reasons.[90]

Treasury controls such reexports of a broader range of products to Iran.[91]

State makes no exceptions in its control of foreign-made products based on U.S.-origin technical data or software.[92]

1.4.1.8 Non-U.S.-Origin

The only controls at this time on exports from one foreign country to another of non-U.S.-origin items by U.S. persons are those administered by Treasury plus Commerce controls if a U.S. person knows of nuclear, missile, or CBW use[93] or Commerce controls on exports of specified items to Rwanda or to Serbia and Montenegro.[94]

1.4.2 Controlled Transaction Types by Agency

1.4.2.1 Software, Technology, Service

The word "item" in Tables 1-3, 1-4, and 1-5 includes software, technology, and service as well as commodities. The Commerce Control List construes "technology" to include technical data and technical assistance and "software" to be separate from "technology."

Commerce requires a license for a U.S. person to perform any contract, service, or employment that the U.S. person knows will assist in missile or chemical or biological weapon activity or

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[90] 15 C.F.R. § 736.2(b)(3).
[91] 31 C.F.R. § 560.204(b).
[92] 22 C.F.R. §§ 124 and 125.1(b).
[93] 15 C.F.R. § 744.6(a)(1)(I).
[94] 15 C.F.R. §§ 746.8 and 746.9.

to participate in a chemical weapon precursor plant in specified countries.[95]

State defines "defense services" as furnishing to foreign persons both technical data and assistance and includes software in its definition of "technical data."[96] The State definition of "defense article" includes technical data recorded or stored in any physical form.[97]

Treasury regulations (other than for Iran, Iraq, Sudan, Libya, and Serbia less Kosovo) do not use any of the words "software," "technology," or "service"; but the words "transactions" and "property" presumably include at least the portion of software, technology, or service that has value.

Energy definitions of "Restricted Data" and of "sensitive nuclear technology" do not mention "software" or "service"; but the words "data" and "information" in those definitions presumably include both software and service.

1.4.2.2 Exports from United States

Most controls on exports from the United States to a foreign country do not differentiate between U.S.-origin and non-U.S.-origin items. Commerce regulations apply to "all items in the United States . . . or moving in-transit through the United States." [98] But Commerce permits specified types of non-U.S.-origin in-transit shipments.[99]

1.4.2.3 Transfers Within United States

Commerce prohibits "any transaction or . . . other action with intent to evade (the controls)."[100] This includes transfers within the United States with such an intent.

The Commerce definition of "export" includes the following:[101]

> . . . release of technology or software subject to the EAR to a foreign national in the United States.

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[95] 15 C.F.R. § 744.6(a)(2,3).
[96] 22 C.F.R. § 120.9(4).
[97] 22 C.F.R. § 120.6.
[98] 15 C.F.R. § 734.3(a)(1).
[99] 15 C.F.R. § 740.9(b).
[100] 15 C.F.R. § 764.2(h).
[101] 15 C.F.R. § 734.2(b)(1).

Prior to 1994, this definition included:[102]

> with the knowledge or intent that the data will be shipped or transmitted from the United States to a foreign country.

Since 1994, any release of technology or software to a foreign national is a deemed export, whether or not there is knowledge or intent to ship or transmit to a foreign country.

The State definition of "export"[103] includes the following five factors:

(1) Sending or taking a defense article out of the United States; or
(2) Transferring registration, control, or ownership to a foreign person of any aircraft, vessel, or satellite covered by the United States Munitions List, whether in the United States or abroad; or
(3) Disclosing (including oral or visual disclosure) or transferring in the United States any defense article to an embassy, any agency or subdivision of a foreign government (*e.g.*, diplomatic missions); or
(4) Disclosing (including oral or visual disclosure) or transferring technical data to a foreign person, whether in the United States or abroad; or
(5) Performing a defense service on behalf of, or for the benefit of, a foreign person, whether in the United States or abroad.

State also regulates proposed sales to specified countries "(including the embassies or consulates of such a country)."[104] This includes embassies or consulates located in the United States.

The EAA authorizes prohibiting or curtailing transfers of goods or technology controlled for security purposes to embassies or "affiliates" of controlled countries (listed communist countries), where "affiliates" includes both governmental and commercial entities controlled-in-fact by controlled countries.[105] This authorization has not been reflected in explicit regulations

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[102] 15 C.F.R. § 779A.1(b)(1)(ii).
[103] 22 C.F.R. § 120.17.
[104] 22 C.F.R. § 126.1(e).
[105] EAA § 5(a)(1).

controlling domestic transfers. However, such transfers might be regarded as attempts to evade controls on exports to such countries and, as such, be subject to penalties for evasion of controls.[106]

1.4.2.4 Reexports

State prohibits unauthorized reexports,[107] with no "permissive reexports" similar to Commerce License Exceptions.[108]

Treasury prohibits exports from the United States to third countries where the exporter has reason to believe that there will be a transshipment to Libya, Iraq, or UNITA Angola.[109] Except for petroleum or petrochemical industry products, the Libyan control does not apply if the goods are substantially transformed in a third country. The Iraqi controls apply to substantially transformations if the product is to be used in Iraq; is being manufactured to fill an Iraqi order; or is sold predominantly to Iraq.

Surprisingly, retransfers of nuclear equipment or material under NRC export licensing authority require authorization not from NRC but from Energy.[110]

Commerce prohibits unauthorized reexports of U.S.-origin items except as noted in section 1.4.1 above.[111]

Treasury controls the reexport to Iran of specified items unless they have been substantially transformed outside the United States and constitute less than 10 percent by value of the product exported from a third country.[112] Treasury also controls the export of Iranian-origin items by U.S. persons located outside the United States.[113]

1.4.2.5 Retransfers in a Foreign Country

Approvals of exports or reexports to a specific end-user for a specific end-use imply a control on retransfers to a different end-user within the authorized importing country or for a different end-use by the authorized end-user.

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[106] EAA § 11(b)(4).
[107] 22 C.F.R. §§ 123.9 and 125.1(c).
[108] 15 C.F.R. § 740.16.
[109] 31 C.F.R. § 550.409(b), 31 C.F.R. § 575.411(a), and 31 C.F.R. § 590.405.
[110] 10 C.F.R. § 110.6.
[111] 15 C.F.R. § 734.3(a)(2).
[112] 31 C.F.R. § 560.205.
[113] 31 C.F.R. § 560.411.

Applications to State for licenses to export "significant" military equipment or classified defense articles must be accompanied by a Non-Transfer and Use Certificate, Form DSP-83, which states that the commodity will not be transferred to any other party without State Department approval.

The State regulations described under "Transfers within the United States" in section 1.4.2.3. above also control transfers within a foreign country.

NRC does not specify controls on transfers within a foreign country. However, such transfers would violate NRC controls if they went beyond the scope of the agreement underlying the export from the United States.

For licenses supported by a Commerce Statement by Ultimate Consignee and Purchaser, these parties have certified that the licensed commodities will not be resold or otherwise disposed of contrary to the disposition or use representations made in this statement.[114]

Commerce explicitly controls transfers of U.S.-origin technology and software within a foreign country. Commerce definitions of "export of technology or software" and of "reexport of technology or software" include release of technology or software in a foreign country or to a foreign national outside the United States[115] and the Commerce definition of "release" includes visual inspection by foreign nationals, oral exchanges abroad, and the application to situations abroad of personal knowledge or technical experience acquired in the United States.[116]

1.4.2.6 Reexport of U.S.-Origin Content in a Foreign-Made Item

This category includes both U.S. content incorporated in or commingled with a foreign-made item and foreign-made products based on U.S.-origin technology.

State prohibits such exports if unauthorized, without exception.[117]

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[114] Form BXA-711.

[115] 15 C.F.R. § 734.2(b)(2,4).

[116] 15 C.F.R. § 734.2(b)(3).

[117] 22 C.F.R. §§ 123.9 and 125.1(b).

Treasury does not prohibit exports to third countries for reexport to Libya if the goods are substantially transformed before shipment to Libya[118] but does prohibit such exports to Iraq or Sudan.[119]

Commerce generally prohibits such exports if unauthorized but permits some such transactions.[120]

1.4.2.7 Export of Non-U.S.-Origin by U.S. Person

This category involves exports from one foreign country to another with no U.S. content, for which the only basis for U.S. jurisdiction is that the exporter is deemed to be a "U.S. person," a term that includes foreign subsidiaries of U.S. parent companies.

Treasury administers such controls to North Korea, Cuba, Iran, Iraq, Sudan, and Serbia.

Under Commerce regulations, a U.S. person may not knowingly assist missile or chemical or biological weapon activities in specified countries.[121] One of the reasons that this regulation is described as unrelated to exports may be that the Commerce General Prohibition One control of reexports is limited to U.S.-origin items.

1.4.2.8 Anti-Boycott Controls

Commerce is the principal agency administering such controls.[122] Controls on restrictive trade practices or boycotts impose penalties for complying with foreign boycotts of third parties, *e.g.*, Israel. They are, thus, in a sense, the opposite of restrictions on exports. However, they are authorized in the Export Administration Act and are included in Commerce Export Administration Regulations. They are, therefore, included in this analysis. They apply not only to doing business with, or in, a boycotted country but also to other types of discriminatory actions and to furnishing information.[123]

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[118] 31 C.F.R. § 550.409(a).

[119] 31 C.F.R. § 575.411 and 31 C.F.R. § 538.411.

[120] See sections 1.4.1.6 and 1.4.1.7 *supra*.

[121] 15 C.F.R. § 744.6(a)(2,3).

[122] 15 C.F.R. § 760. Also see Chapter 7 *infra* for inconsistencies between anti-boycott provisions of the Internal Revenue Code and of the Export Administration Act.

[123] See Chapter 7 *infra* for further information.

Ironically, some U.S. extraterritorial sanctions bear a striking resemblance to the activities that the United States opposes in anti-boycott controls.[124]

1.4.2.9 Financial and Other Support

Treasury now administers most financial controls.

Commerce requires a license for a U.S. person to "support" an export, reexport, or transfer that does not have a license as required for non-proliferation purposes. "Support" is defined as any facilitating action, including financing, transportation, and freight forwarding.[125]

State also controls such support, under the heading "brokering activity."[126]

1.5 STEPS TO DETERMINE AGENCY JURISDICTION

Table 1-6 is a decision tree. It consists of a logical series of seventeen questions with "yes" or "no" answers. Its purpose is to assist in determining whether a specific transaction is subject to a U.S. export control. It also indicates which U.S. agency probably has jurisdiction and, in some instances, whether a foreign government might also claim jurisdiction. The information presented amounts to a recapitulation of sections 1.1 through 1.4 above.

1.6 U.S. EXTRATERRITORIAL CONTROLS

The decision tree in Table 1–6 at the end of this chapter indicates the potential for jurisdictional conflicts between the United States and other countries, especially when the United States asserts a control over a transaction taking place in the territory of another country.

The U.S. Government has recognized this problem and taken steps to reduce its adverse effects. However, many extraterritorial controls remain.

Legislation in 1977 was designed to restrain the Administration from overreaching in its exercise of extraterritorial controls. During that year, Trading With the Enemy Act (TWEA) amendments were

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[124] See section 8.6 *infra*.

[125] 15 C.F.R. § 744.6(a)(1)(ii).

[126] 22 C.F.R. § 129.

adopted that limited any new application of that statute to wartime situations. In addition, the International Emergency Economic Powers ACT (IEEPA) was enacted. IEEPA requires the declaration of a germane emergency as the basis for any new emergency controls. The EAA was also amended to authorize controls under that Act on exports of non-U.S.-origin items by U.S. persons. The objective of the EAA amendment was to discourage exercise of such controls by transferring the authority from TWEA, which is permanent legislation, to EAA, which is temporary legislation and, therefore, subject to periodic Congressional review when being renewed.

Nevertheless, extraterritorial controls surged in the late 1970s and early 1980s, abated somewhat in the mid 1980s, but surged again in the 1990s.

The Department of Commerce now exercises its authority to control exports of non-U.S.-origin items from foreign countries only to known missile or CBW use or to Rwanda or Serbia & Montenegro for specified items. However, Treasury controls exports by a U.S. person of any item to North Korea, Cuba, Iran, Iraq, Sudan, or Serbia and of items subject to the Arms Export Control Act or the Atomic Energy Act from non-former-COCOM member or cooperating countries to COCOM-proscribed destinations or Cambodia.

However, Commerce also does not now exercise authority to control the following types of reexports of U.S.-origin items:

- The U.S.-origin content in a foreign-made item is 25 percent or less (10 percent or less if to North Korea, Cuba, Libya, Iran, Iraq, Syria, Sudan, Serbia, or Taliban-controlled areas in Afghanistan) with specified exceptions.[127]
- To any country except former COCOM-proscribed destinations, Cambodia, Cuba, or Libya for a foreign-produced direct product of U.S.-origin technology or software (although Treasury imposes a similar control to Iran).
- To Iran, Sudan, or Syria of a few specified items.[128]

Such U.S. non-exercise of authority has reduced the scope of U.S. extraterritorial controls but has not removed the fundamental bases for Allied objections.

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[127] 1 C.F.R. § 734.4(a,b,e,h).

[128] 15 C.F.R. §§ 740.16(i), 742.8(a)(2), 742.9(b)(1)(iv), 742.10(a)(2).

TABLE 1-1
Agency Controls by Book Chapters

Agency	*Chapters*
Commerce BXA	1, 4, 5, 6, 7, 8
State ODTC	1, 2
Treasury OFAC	1, 3
EPA, CPSC, FDA	1, 9
All others	1

TABLE 1-2
U.S. Government Agencies Controlling Exports

Agency	*What Is Controlled*	*Statutory Authority*	*Regulations*
Department of State	Munitions Visas	Arms Export Control Act	22 C.F.R. § 120 *ff*. 22 U.S.C. § 2751 *ff*.
Department of Treasury	N. Korea	Trading with the Enemy Act	31 C.F.R. § 500
OFAC	"COCOM-proscribed" destinations	50 U.S.C. App. 5	31 C.F.R. § 505
	Cuba		31 C.F.R. § 515
	Libya	International Emergency	31 C.F.R. § 550
	Iraq	Economic Powers	31 C.F.R. § 575
	Iran	Act 50 U.S.C. § 1701 *ff*.	31 C.F.R. § 560
	Sudan		31 C.F.R. § 538
	Serbia		31 C.F.R. § 586
	UNITA (Angola)		31 C.F.R. § 590
	Taliban		
Nuclear Regulatory Commission	Nuclear equipment and materials	Atomic Energy Act 42 U.S.C. § 2011 *ff*.	10 C.F.R. § 110
Department of Energy	Nuclear weapons Restricted Data	Atomic Energy Act	10 C.F.R. § 810

	Sensitive nuclear technology	42 U.S.C. § 2011*ff*.	
	Natural gas	Natural Gas Act	10 C.F.R. §§ 205.300-379
	Electric energy	Federal Power Act	10 C.F.R. § 590
Department of Justice	Narcotics and dangerous drugs	Controlled Substances Import and Export Act 21 U.S.C. § 951*ff*.	21 C.F.R. §§ 1311-1313
Environmental Protection Agency	Hazardous wastes	Resource Conservation and Recovery Act 42 U.S.C. § 6938*ff*.	40 C.F.R. § 262.50*ff*.
	Listed chemicals	Toxic Substances Control Act 15 U.S.C. § 2611(b)	40 C.F.R. § 707.60
	Insecticides, pesticides	Federal Insecticide, Fungicide, and Rodenticide Act 7 U.S.C. § 1360(a) & (b)	40 C.F.R. § 168.75

TABLE 1-2 (CONTINUED)

Agency	*What Is Controlled*	*Statutory Authority*	*Regulations*
Consumer Product Safety Commission	Hazardous substances	Consumer Product Safety Act 15 U.S.C. § 2067 Federal Hazardous Substances Act 15 U.S.C. § 126 Flammable Fabrics Act 15 U.S.C. §§ 1191, 1193	16 C.F.R. § 1010 16 C.F.R. § 1019
Food and Drug Administration	Foods, drugs, biological products, devices	Federal Food, Drug, and Cosmetic Act Drug Export Amendments Act of 1986 21 U.S.C. § 301 *ff*. 42 U.S.C. § 262	21 C.F.R. §312.110
Department of Agriculture	Tobacco seeds and plants	Tobacco Seed and Plant Exportation Act 7 U.S.C. § 516 *ff*.	

Department of Interior	Endangered fish and wildlife	16 U.S.C. § 1531 *ff*. 16 U.S.C. § 703 *ff*. 16 U.S.C. § 668	50 C.F.R. § 17.21 *ff*.
Department of Transportation	American carriers		44 C.F.R. § 403
Maritime Administration	Vessels		46 C.F.R. § 221
Patent and Trademark Office	Patent applications for filing in a foreign country	35 U.S.C. §§ 6, 181 *ff*.	37 C.F.R. § 5
Various	Classified information		Executive Order 12,356
Various	Technical data		Contractual restrictions
Department of Commerce BXA	All other	International Emergency Economic Powers Act 50 U.S.C. § 1701 *ff*.	15 C.F.R. §§ 730-774

TABLE 1-3
Transaction Types Controlled

Mechanism	*Content*	*From*	*To*
a) Export	U.S. or non-U.S.-origin	United States	Foreign country
b) Transfer	U.S. or non-U.S.-origin	United States	United States
c) Reexport	U.S.-origin item	One foreign country	Another foreign country
d) Retransfer	U.S.-origin item	Original consignee	Another consignee in same country
e) Reexport	U.S.-origin content in foreign-made item	One foreign country	Another foreign country
f) Reexport	Foreign-made direct product of U.S.-origin software, technical data, or service	One foreign country	Another foreign country
g) Export by U.S. person	Non-U.S.-origin item	One foreign country	Another foreign country
h) Visa	Technical data	United States	United States
i) Refusal by U.S. person	to do business with boycotted country		
j) Finance, transport, or freight forward	Trade with targeted country		
k) Contract, service, or employment	Assistance	U.S. person	
l) Assistance, participation, support	Missile or chemical or biological weapon activity	U.S. person	Specified country

TABLE 1-4

U.S. Jurisdiction Not Exercised[1]

Type of Transaction	*Portion Uncontrolled*	*15 C.F.R. §*	*22 C.F.R. §*
a) Export from U.S.	Publicly available technology and software[2]	734.3(b)(2,3) 744.6(a)(2,3) ECCN 5D002 second Note 732.2(b)(1)	125.1(a,b) 125.4(b)(13) 124.1(a) 124.13(e)
	To Canada[2]	738 Supp. 1 742.11(a), 742.13(a)(1) 744, 754	126.5(b)
	To USG agency	740.11(b)(2)(i,ii)	126.4
	In-transit[2]	740.9(b),736.2(b)(8)[3]	
	Returned to source	740.9(b)	125.4(b)(7)
b) Transfers within U.S.		764.2(h)[3] 772 Transfer	120.17(2-5)[2]
c) Reexport of U.S. origin	Between Switzerland and Liechtenstein	740.16(g)	
	Return to U.S.	740.16(e)	
	To Canada	740.16(f)	
	From or to former COCOM, Austria, Finland, Hong Kong, Ireland, South Korea,	740.16(a,b)	

TABLE 1-4 (CONTINUED)

Type of Transaction	*Portion Uncontrolled*	*15 C.F.R. §*	*22 C.F.R. §*
	New Zealand, Sweden, or Switzerland		
	Computers from or to Computer Tier 1	742.12(b)(1)(i)	
	To Rwanda or Serbia and Montenegro by other than a U.S. person	746.8(b)(1)	
		746.9(a)(1)	
d) Retransfer in a foreign country		764.2(a)[3]	123.10(a)[3]
		744.6(a)(1)[3]	
e) Reexport of U.S. components	Less than specified U.S. content	734.4[2]	
f) Reexport of product of U.S. technology		736.2(b)(3)[3]	
g) Export of non-U.S.-origin from foreign country	If not controlled by Treasury and missile or CBW use not known	744.6(a)(2,3)[3]	
		744.6(b)[3]	

[1]Commerce License Exceptions or no license required (NLR) provisions included in Table 1-4 (and others omitted from that Table because not constituting broad transaction types) are still "subject to the EAR" with respect to export clearance requirements and to the possibility of recontrol through suspension or revocation of the License Exception or NLR.

[2]Subject to some restrictions.

[3]Describes exercised jurisdiction.

TABLE 1-5
Transaction Types by Agency

Type of Transaction	*Agency*
a) Commodity export from U.S. or transfer within U.S.	State, Treasury (Iran, Iraq, Libya, Sudan, UNITA), NRC, Energy (gas, electricity), Justice, EPA, CPSC, FDA, Agriculture, Interior, Commerce
b) Software, technical data, or service export from U.S. or transfer within U.S.	State, Treasury (Iran, Iraq, Libya, Sudan, UNITA), Energy, Patent Office, Commerce
c) Reexport of U.S.-origin item	State, Treasury (Libya, UNITA), NRC (DOE), Commerce
d) Retransfer in a foreign country	State, NRC, Commerce, implicit for others
e) Reexport of U.S.-origin content in foreign-made item	State, Commerce
f) Reexport of foreign-made product of U.S.-origin technical data or software	State, Treasury, Commerce
g) Export of non-U.S.-origin by U.S. person from one foreign country to another	Treasury (Cuba, North Korea, Iran, Iraq, Sudan, Serbia less Kosovo, Taliban), Commerce
h) Visa	State
i) Refusal by U.S. person to do business with boycotted county	Commerce
j) Support trade with targeted country	Treasury, Commerce
k) Service munitions, missiles, or CBW	State, Commerce
l) Missile, CBW activities	Commerce

TABLE 1-6
Decision Tree to Determine Agency Jurisdiction

(Table omits special rules on Taliban since regulations not yet issued)

1) Is the proposed transaction any of the types listed in Table 1-3?

↘ If no: It is not subject to U.S. export controls.

↓

2) If yes: Is it
   a) a visa application?
   b) refusal by a U.S. person to do business with a boycotted country?
   c) supporting trade with a targeted country?
   d) classified information? or
   e) subject to a restriction in a U.S. government contract?

↘ If yes: It is subject to the jurisdiction of the following:
   (a) State,
   (b) Commerce,
   (c) Treasury or Commerce,
   (d) State or Energy, or
   (e) Agency which established the contractual restriction. It may also be subject to another export control.

↓

3) If no: Is it
   a) an export of non-U.S.-origin by a U.S. person from any foreign country to North Korea, Cuba, Iran, Iraq, Sudan, or Serbia less Kosovo, or to a missile project listed in Country Group D:4 in 15 C.F.R. § 740 Supp.1 for a known missile use in a D-4 country, or to a D:3 country for a known CBW use?

TABLE 1-6 (CONTINUED)

(Table omits special rules on Taliban since regulations not yet issued)

b) an export arranged by a person in the United States of an item subject to controls under the Arms Export Control Act or the Atomic Energy Act from a country neither a former-COCOM-member nor a cooperating country to a former COCOM-proscribed country or Cambodia?

c) an export by a U.S. person or from the United States to UNITA (Angola) of an arms-related item?

↘ If yes: Treasury, State, NRC, Energy, or Commerce. It may also be subject to a control administered by the exporting country.

4) If no: Is it an export from a foreign country of U.S. content in a foreign-made product:

a) to North Korea, Cuba, Iraq, Iran, Sudan, Syria, Serbia less Kosovo, or Taliban and more than 10% U.S.-origin content? or

b) to any other destination and more than 25% U.S.-origin content? or

c) controlled for national security reasons, being exported to a former COCOM-proscribed destination, Cambodia, Cuba, or Libya

TABLE 1-6 (CONTINUED)

(Table omits special rules on Taliban since regulations not yet issued)

and the direct product of U.S.-origin technology or software?

↘ If yes: It is subject to Commerce jurisdiction, but may be eligible for a Commerce License Exception or no license required (NLR) provision. It may also be subject to a control administered by the exporting country.

↓

5) If no: Is it a retransfer in a foreign country affecting an end-user or end-use specified in the approval of an export from the U.S.?

↘ If yes: It is subject to the jurisdiction of the agency which approved the export from the U.S. It is unlikely to be subject to a control administered by the exporting country. It is likely that country would not recognize U.S. jurisdiction.

↓

6) If no: Is it a transfer, whether in the United States or abroad, to a foreign person of
   a) an aircraft, vessel, or satellite on the U.S. Munitions List?
   b) technical data on that List? or
   c) a defense service described on that List?
   d) an item on that list to a foreign embassy or other agency of a foreign government?

TABLE 1-6 (CONTINUED)

(Table omits special rules on Taliban since regulations not yet issued)

7) If no: Is it a transfer in a foreign country of technical data not on the U.S. Munitions List?

↘ If yes: State.

↘ If yes: It is subject to the jurisdiction of Commerce (or both Commerce and Energy), but it may be eligible for a Commerce License Exception or NLR. It is unlikely to be subject to a control by the foreign country where the transfer takes place. That country is likely not to recognize U.S. jurisdiction.

8) If no: Is it a reexport of a U.S.-origin item from a foreign country to Libya, Iraq, Sudan, or Serbia less Kosovo, or, if of specified items, to Iran?

↘ If yes: Treasury or Commerce. It is unlikely to be subject to a control by the exporting country. That country is likely not to recognize U.S. jurisdiction.

9) If no: Is it a reexport from a foreign country of a U.S.-origin commodity or of U.S.-origin technology or software other than:

TABLE 1-6 (CONTINUED)

(Table omits special rules on Taliban since regulations not yet issued)

a) to the U.S.?
b) to Canada, except for items shown on the Control List as requiring a license to Canada or for end–user or end–use controls described in 15 CFR 744?
c) from and authorized by a former COCOM participating country, Austria, Finland, Hong Kong, Ireland, New Zealand, Sweden, or Switzerland controlled for national security reasons; not subject to nuclear, chemical, biological, missile, significant item (SI), or crime control export controls; and either to a former COCOM-proscribed destination or to a country not embargoed, not formerly COCOM-proscribed, and not controlled for nuclear, chemical and biological, or missile reasons, provided a license is not required to a former COCOM member?
d) to or among former COCOM participating countries, Austria, Finland, Hong Kong, Ireland, New Zealand, Sweden, or Switzerland of a commodity which is not a computer exceeding 10,000 mtops nor controlled for nuclear or missile reasons?

TABLE 1-6 (CONTINUED)

(Table omits special rules on Taliban since regulations not yet issued)

e) between Switzerland and Liechtenstein?

↘ If yes: It is subject to the jurisdiction of Commerce, although it may qualify for a Commerce License Exception or NLR. Whether or not it qualifies for a Commerce License Exception or NLR, it may be subject to a control administered by the exporting country.

↓

10) If no: Is it an export from the U.S. to Libya, Iran, Iraq, Sudan, or Serbia less Kosovo?

↘ If yes: Treasury.

↓

11) If no: Is it:
- a) Natural gas or electric energy?
- b) Tobacco seeds or plants?
- c) Endangered fish or wildlife? or
- d) Patent application for filing in a foreign country?

↘ If yes: It is subject to the jurisdiction of the following:
- a) Energy,
- b) Agriculture,
- c) Interior, or
- d) Patent & Trademark Office.

↓

12) If no: Is it:
- a) Nuclear equipment or materials?
- b) Nuclear technology?

↓

TABLE 1-6 (CONTINUED)

(Table omits special rules on Taliban since regulations not yet issued)

c) Drugs or hazardous substances?

↘ If yes: It may be subject to the jurisdiction of the following:
- a) NRC,
- b) Energy, or
- c) Justice, EPA, CPSC, or FDA.

13) If not controlled by NRC or Energy: Is it
- a) a defense article on the U.S. Munitions List? or
- b) arguably on both the U.S. Munitions List and the Commerce Control List?

↘ If yes: State.

14) If no: Is it a transaction of any type intended to evade an export control?

↘ If yes: It is subject to the control it is intended to evade.

15) If no: Is it non-U.S.-origin in-transit through the U.S. and qualifying for 15 C.F.R. § 740.9(b)?

↘ If yes: No U.S. control.

16) If no: Is it an export from the United States:
- a) to Canada, other than for the items shown on the Control List as requiring a license to Canada or for

TABLE 1-6 (CONTINUED)

(Table omits special rules on Taliban since regulations not yet issued)

end-user or end-use controls per 15 C.F.R. § 744? or

b) personal or official use by U.S. Government personnel or agencies per 740.11(b)(2)(i,ii)?

↘ If yes: No U.S. control.

17) If no: Is it an export from the United States to a foreign country?

↘ If yes: It is subject to Commerce jurisdiction, although it may be eligible for a Commerce License Exception or NLR.

18) If no: No U.S. control.

APPENDIX 1-1 Commerce Deferrals to State Jurisdiction

(*means item appears on CCL without Wassenaar or MTCR sub-item detail)
(**means deferral of "missile" production equipment which is inconsistent with non-deferral of "munitions" production equipment)

Power generating or propulsion equipment for use with space, marine, or mobile nuclear reactors (ECCN 0A002 and software therefor ECCN 0D001);
Specified ammunition components and parts (ECCN 0A018.c);
Military helmets equipped with specified accessories (ECCN 0A018.f);
Shotguns with barrel length less than 18 inches (ECCN 0A984);
Fluorinated components for items on the U.S. Munitions List (ECCN 1A001);
Protection and detection equipment not specially designed for military use (ECCN 1A004)*

a. Gas masks, filter canister and decontamination equipment therefor designed or modified for defense against biological agents or radioactive materials "adapted for use in war" or chemical warfare (CW) agents and specially designed components therefor;
b. Protective suits, gloves and shoes specially designed or modified for defense against biological agents or radioactive materials "adapted for use in war" or chemical warfare (CW) agents;
c. Nuclear, biological and chemical (NBC) detection systems specially designed or modified for detection or identification of biological agents or radioactive materials "adapted for use in war" or chemical warfare (CW) agents and specially designed components therefor.

Note: 1A004 does not control:

a. Personal radiation monitoring dosimeters;
b. Equipment limited by design or function to protect against hazards specific to civil industries, such as mining, quarrying, agriculture, pharmaceuticals, medical, veterinary, environmental, waste management, or to the food industry.

Bulletproof and bullet resistant vests NIJ levels III and IV (ECCN 1A005);
Resaturated pyrolized carbon-carbon materials designed for missiles (ECCN 1A102 and software and technology therefor 1D002, 1E001, 1E101);
Equipment specially designed for the production of military propellants or propellant constituents (ECCN 1B115)**;
Small particles of zirconium, magnesium, boron, boron carbide, aluminum, or iron (ECCNs 1C011 and 1C111);
Quiet running bearings (ECCNs 2A001 and 2A991);
Analog to digital converters usable in missiles (ECCN 3A101.a);
Equipment for transient ionizing radiation (ECCN 4A001);
Hybrid computers for missiles (ECCN 4A102);
Space-qualified imaging sensors and focal plane arrays for items on the U.S. Munitions List (ECCN 6A002);
Inertial equipment for military use (ECCNs 7A003 and 7A103.a and software and technology therefor 7D001, 7D101, 7D102, 7E001, 7E002, 7E101);
Global navigation satellite systems (ECCNs 7A005 and 7A105 and software and technology therefor 7D001, 7D101, 7E001, 7E002, 7E101 and 7A994)*;

a. Employing decryption; or
b. A null-steerable antenna or
a. Capable of providing navigation information under the following operational conditions:
    1. At speeds in excess of 515 m/s (1,000 nautical miles/hour); and
    2. At altitudes in excess of 18 km (60,000 feet); or
b. Designed or modified for use with unmanned air vehicles capable of delivering at least a 500 kg payload to a range of at least 300 km.

Direction finding equipment above 30 MHz (ECCN 7A007 and software and technology therefor 7D001, 7D101, 7E001, 7E002, 7E101)*;
Having all of the following characteristics:

a. "Instantaneous bandwidth" of 1 MHz or more;
b. Parallel processing of more than 100 frequency channels; and

c. Processing rate of more than 1,000 direction finding results per second and per frequency channel.

Integrated flight instrument systems for missiles (ECCNs 7A103.b, 7D001, 7D101, 7E001, 7E002, 7E101);

Altimeters for use in missiles (ECCNs 7A106, 7D001, 7D101, 7E001, 7E002, 7E101);

Passive sensors for missiles (ECCNs 7A115, 7D001, 7D101, 7E001, 7E002, 7E101);

Flight control systems for missiles (ECCNs 7A116, 7D001, 7D101, 7E001, 7E002, 7E101);

Guidance sets for missiles (ECCNs 7A117, 7D001, 7D101, 7E001, 7E002, 7E101); "production facilities" for guidance sets (ECCNs 7B103, 7D001, 7D101, 7E001, 7E002, 7E101)**;

Software for simulation of guidance sets (ECCN 7D103);

Technology for integration of data into a flight management system (ECCN 7E104);

Space launch vehicles and spacecraft (ECCN 9A004, 9D001-3, 9E001,2, 9E102);

Liquid rocket propulsion systems containing 9A006 systems or components (ECCNs 9A005, 9D001-3, 9E001,2);

Systems or components for liquid rocket propulsion systems (ECCNs 9A006, 9D001-3, 9E001,2)*;

a. Cryogenic refrigerators, flightweight dewars, cryogenic heat pipes or cryogenic systems specially designed for use in space vehicles and capable of restricting cryogenic fluid losses to less than 30% per year;
b. Cryogenic containers or closed-cycle refrigeration systems capable of providing temperatures of 100 K (−173°C) or less for "aircraft" capable of sustained flight at speeds exceeding Mach 3, launch vehicles or "spacecraft";
c. Slush hydrogen storage or transfer systems;
d. High pressure (exceeding 17.5 Mpa) turbo pumps, pump components or their associated gas generator or expander cycle turbine drive systems;
e. High-pressure (exceeding 10.6 Mpa) thrust chambers and nozzles therefor;
f. Propellant storage systems using the principle of capillary containment or positive expulsion (*i.e.*, with flexible bladders);

g. Liquid propellant injectors, with individual orifices of 0.381 mm or smaller in diameter (an area of 1.14×10^{-3} cm^2 or smaller for non-circular orifices) specially designed for liquid rocket engines;
h. One-piece carbon-carbon thrust chambers or one-piece carbon-carbon exit cones with densities exceeding 1.4 g/cm^3 and tensile strengths exceeding 48 MPa.

Solid rocket propulsion systems (ECCNs 9A007, 9D001-3, 9E001,2)*;

a. Total impulse capacity exceeding 1.1 Mns;
b. Specific impulse of 2.4 kNs/kg or more when the nozzle flow is expanded to ambient sea level conditions for an adjusted chamber pressure of 7 Mpa;
c. Stage mass fractions exceeding 88% and propellant solid loadings exceeding 86%;
d. Any of the components controlled by 9A008; or
e. Insulation and propellant bonding systems using direct-bonded motor designs to provide a strong mechanical bond or a barrier to chemical migration between the solid propellant and case insulation material.
Technical Note:
For the purposes of 9A007.e, a strong mechanical bond means bond strength equal to or more than propellant strength.

Components for solid rocket propulsion systems (ECCNs 9A008, 9D001-3, 9E001,2)*;

a. Insulation and propellant bonding systems using liners to provide a strong mechanical bond or a barrier to chemical migration between the solid propellant and case insulation material;
Technical Note:
For the purposes of 9A008.a., a strong mechanical bond means bond strength equal to or more than propellant strength.
b. Filament-wound "composite" motor cases exceeding 0.61 m in diameter or having structural efficiency ratios (PV/W) exceeding 25 km.
Technical Note:

The structural efficiency ratio (PV/W) is the burst pressure (P) multiplied by the vessel volume (V) divided by the total pressure vessel weight (W).

c. Nozzles with thrust levels exceeding 45 kN or nozzle throat erosion rates of less than 0.075 mm/s;
d. Movable nozzle or secondary fluid injection thrust vector control systems capable of any of the following:
   1. Omni-axial movement exceeding + 5°;
   2. Angular vector rotations of 20°/s or more; or
   3. Angular vector accelerations of $40°/s^2$ or more.

Hybrid rocket propulsion systems (ECCNs 9A009, 9D001-3, 9E001,2)*;

a. Total impulse capacity exceeding 1.1 Mns; or
b. Thrust levels exceeding 220 kN in vacuum exit conditions.

Components, systems and structures for launch vehicles, launch vehicle propulsion systems or spacecraft (ECCNs 9A010, 9D001-3, 9E001,2)*;

a. Components and structures each exceeding 10 kg. Specially designed for launch vehicles manufactured using metal "matrix", "composite", organic "composite", ceramic "matrix" or intermetallic reinforced materials controlled by 1C007 or 1C010;
   Note: The weight cut-off is not relevant for nose cones.
b. Components and structures specially designed for launch vehicle propulsion systems controlled by 9A005 to 9A009 manufactured using metal matrix, composite, organic composite, ceramic matrix or intermetallic reinforced materials controlled by 1C007 or 1C010;
c. Structural components and isolation systems specially designed to control actively the dynamic response or distortion of "spacecraft" structures;
d. Pulsed liquid rocket engines with thrust-to-weight ratios equal to or more than 1 kN/kg and a response time (the time required to achieve 90% of total rated thrust from start-up) of less than 30 ms.

Instrument flight trainers for combat simulation (ECCN 9A018);
Lightweight turbojet and turbofan engines (ECCNs 9A101, 9D001-3, 9E101,2);

Sounding rockets capable of a range of 300 km (ECCNs 9A104, 9D001-3, 9E101,2);
Liquid propellant rocket engines (ECCNs 9A105, 9D001-3, 9E101,2)*;

a. Liquid propellant rocket engines "usable in" "missiles", other than those controlled by 9A005, having a total impulse capacity of 1.1 MNs or greater;
b. Liquid propellant rocket engines "usable in" rockets with a range capability of 300 km or greater, other than those controlled by 9A005 or 9A105.a, having a total impulse capacity of 0.841 MNs or greater.

Liquid rocket propulsion systems or components (ECCNs 9A106, 9D001-3, 9E101,2);
Solid propellant rocket engines (ECCNs 9A107, 9D001-3, 9E101,2);
Solid rocket propulsion components (ECCNs 9A108, 9D001-3, 9E101,2)*;

a. Rocket motor cases, "interior lining" and "insulation" therefor;
   Note:
   "Interior lining" is suited for the bond interface between the solid propellant and the case or insulating liner. It is usually a liquid polymer based dispersion of refractory or insulating material, *e.g.*, carbon filled HTPB or other polymer with added curing agents to be sprayed or screeded over a case interior.
   "Insulation" is intended to be applied to the components of a rocket motor, *i.e.*, the case, nozzle inlets, or case closures. It includes cured or semi-cured compounded rubber sheet stock containing an insulating or refractory material. It may also be incorporated as stress relief boots or flaps.
b. Rocket nozzles;
c. Thrust vector control sub-systems.
   Technical Note:
   Examples of methods of achieving thrust vector control specified in 9A108.c are:
   1. Flexible nozzle;
   2. Fluid or secondary gas injection;
   3. Movable engine or nozzle;

4. Deflection of exhaust gas stream (jet vanes or probes); or
5. Thrust tabs.

Hybrid rocket motors (ECCNs 9A109, 9D001-3, 9E101,2);

Composite structures, laminates and manufactures thereof for missiles and missile subsystems (ECCNs 9A110, 9D001-3, 9E101,2);

Pulse jet engines uable in missiles (ECCNs 9A111, 9D001-3, 9E101,2);

Launch support equipment for missiles (ECCNs 9A115, 9D001-3, 9D102, 9E101,2)*

a. Apparatus and devices for handling, control, activation or launching;
b. Vehicles for transport, handling, control, activation or launching.

Reentry vehicles usable in missiles (ECCNs 9A116, 9D001-3, 9E101,2)*

a. Reentry vehicles;
b. Heat shields and components therefor fabricated of ceramic or ablative materials;
c. Heat sinks and components therefor fabricated of light-weight, high heat capacity materials;
d. Electronic equipment "specially designed" for reentry vehicles.

Staging mechanisms (ECCNs 9A117, 9D001-3, 9E101,2);

Devices to regulate combustion (ECCNs 9A118, 9D001-3, 9E101,2);

Individual rocket stages (ECCNs 9A119, 9D001-3, 9E101,2);

Production equipment for missiles and missile subsystems (ECCNs 9B115, 9D001-3, 9E001,2, 9E101,2)**;

Production facilities for missiles and missile subsystems (ECCNs 9B116, 9D001-3, 9E001,2, 9E101,2)**;

Software for modelling, simulation or design integration of missiles or missile subsystems (ECCNs 9D103, 9E001);

Hot section technology for military uses (ECCN 9E003);

Technology for design, development, production, or manufacture of civil aircraft inertial navigation equipment (15 C.F.R. § 770.2(j)(2) Commodity Interpretation No. 10; 22 C.F.R. § 121.1 Category VIII(g) and (h); EAA Section 17(c));

Commodities and technology for:

design, development, or fabrication of nuclear weapons or nuclear explosive devices; or

evaluating nuclear weapons tests or nuclear explosives, except such items as are in normal commercial use for other purposes

(Footnote 2 to 15 C.F.R. § 744.2(a)(1) refers to State controls and to restrictions under the Atomic Energy Act);

Scrap arms, ammunition, and implements of war, when in doubt if they have been rendered useless (15 C.F.R. § 770.2(g) Interpretation 7).

APPENDIX 1-2 State-Commerce Concurrent Jurisdiction

Specific ECCNs:

ECCN 0A018 components and parts for ammunition vs. Category III(b) components, parts . . . for (ammunition)

ECCN 1A984 chemical agents vs. Category XIV(a) chemical agents

ECCN 1B018.a equipment for the production of military explosives and solid propellants vs. Category III(d) ammunition manufacturing machines and ammunition loading machines (except handloading ones)

ECCN 1C010.b and .e carbon materials vs. Category XIII(d) carbon materials (the technical inclusions and exclusions of the Commerce and State items do not correspond)

ECCNs 1C011.c guanidine nitrate vs. 22 C.F.R. § 121.12(c)(2) guanidine nitrate

ECCN 1C018 charges specially designed for civilian applications containing military explosives vs. 22 C.F.R. § 121.12 Note Category V includes the following substances when compounded or mixed with military explosives

ECCNs 1C351-1C354 and 1C991 pathogens, toxins, microorganisms, vaccines vs. Category XIV(b) biological agents

ECCN 2B351 toxic gas monitoring systems and dedicated detectors therefor and ECCN 2B352.g chambers designed for aerosol challenge testing with microorganisms, viruses, or toxins vs. Category XIV(c) equipment for . . . detection,. . . of,. . . (chemical agents and biological agents)

ECCNs 3A001.b.1.a.4.c, 3A001.e.1.c, 3A002.a.3.b, 3A002.g.2, 6A002.a.1, 6A002.a.1, 6A002.b.2.b.1, 6A002.e, 6A004.c, 6A004.d.1, 6A007.b "space qualified" items, which term is defined in 15 C.F.R. § 772 as meeting "requirements for use in the launch and deployment of satellites or high-altitude flight systems . . ." vs. Category IV(h) all specifically designed or modified components, parts, accessories, attachments, and associated equipment for (launch vehicles and missile systems) and Category XV(c) systems, components, parts, accessories, attachments, and associated equipment specifically designed, modified or configured for (spacecraft)

ECCNs 4A003 Note 1.f signal processing, defined to include time compression, vs. Category XI(b)(2) time compression

ECCN 5A980 communications intercepting devices vs. Category XI(b) electronic systems for intelligence or security purposes for use in search, reconnaissance, collection, monitoring, direction-finding, display, analysis and production of information from the electromagnetic spectrum and electronic systems or equipment designed or modified to counteract such surveillance and monitoring;

ECCN 5A002.a.5 designed equipment or modified to use cryptographic techniques to generate the spreading code for "spread spectrum" or the hopping code for "frequency agility" systems and ECCN 5A001.b.8 radio equipment employing "spread spectrum" or "frequency agility" (frequency hopping) techniques . . . vs. Category XI(b)(1) designed equipment or modified to use cryptographic techniques to generate the spreading code for spread spectrum or hopping code for frequency agility. This does not include fixed code techniques for spread spectrum.

ECCNs 7A004 and 7A104 gyro-astro compasses vs. Category XII(d) astro compasses and star trackers

ECCN 8A018.a closed and semi-closed circuit (rebreathing) apparatus for diving and underwater swimming, and specially designed components for use in the conversion of open-circuit apparatus to military use vs. Category XIII(c) self-contained diving and underwater breathing apparatus as follows: (1) closed and semi-closed circuits (rebreathing) apparatus; (2) specially designed components for use in the conversion of open-circuit apparatus to military use

ECCN 9A018.a.3 T-37 model jet trainer aircraft vs. Category VIII(a) aircraft . . . for . . . military training (22 C.F.R. § 121.3 excludes military trainer aircraft described in 9A018.a.1 and a.2 but not a.3)

ECCN 9A018.b vehicles specially designed for military purposes (also see 15 C.F.R. § 770.2(h) Interpretation 8 for details on Commerce view of division of jurisdiction between EAR and ITAR) vs. Category XXI any (other) article . . . specifically designed . . . for military purposes

9A018.c, d, e ground equipment, n.e.s., developed specially for military aircraft and helicopters; pressurized breathing equipment specially designed for use in military aircraft and helicopters; and military parachutes vs. Category XXI any (other) article . . . specifically designed for military purposes

ECCN 9A018.f military instrument flight trainers vs. Category IX(a) military training equipment including but not limited to . . .

General Language:

Accessories and attachments are defined by ITAR as "associated equipment for any component, end-item or system and which are not necessary for their operation, but which enhance their usefulness or effectiveness" (22 C.F.R. § 121.8(c)). The terms "accessories," "attachments" or "associated equipment" appear in USML Categories II(c), III(b), IV(h), VI(f), VII(h), VIII(e,g,h), IX(b), X(d), XI(c), XII(e), XIII(e,h), XIV(e), and XX(c). A similar term, "ancillary equipment," appears in XIII(b)(5). Most CCL equipment items controlled for security purposes can be, and some have been, construed as covered by the USML because of enhancing the usefulness of a USML component, end-item or system. The possibilities of such interpretations are virtually limitless, because the equipment by definition, is not necessary for the operation of the USML item.

Materials are covered by Category IV(f) (ablative materials fabricated or semi-fabricated from advanced composites for the articles in this category that are derived directly from or specifically developed or modified for defense articles) and Category XIII(d) (structural materials including carbon/carbon and metal matrix composites, plate, forgings, castings, welding consumables and rolled and extruded shapes which have been specifically designed or modified for defense articles). Many CCL materials items were originally designed for defense articles and include semi-fabricated shapes.

The word "including" precedes specific lists in Categories III(b), IV(c) as modified by 121.5, V as modified by 121.12(a,b,c) and 121.13, VI(a) as modified by 121.15, VI(e), VIII(a,c,g,h), IX(a), X(a), XI(a,b), XII(b), XIII(b,d,e,j), and XIV(a). This means that none of these lists are definitive and the general wording preceding the word "including" could be, and on occasion has been, interpreted to have broad coverage

The words "intelligence" and "security" in Category XI(b) could easily be interpreted to include all electronic equipment on the CCL controlled for NS or "security" purposes. ECCNs particularly vulnerable to challenges of State jurisdiction under XI(b) are 3A002.b, d frequency synthesizers; 3A002.c signal analyzers,

5A001.b.8 and 5A002.a.5 equipment employing "spread spectrum" or "frequency agility," 5A001.d phased array antennae, and 5A002.a.6 systems to provide multilevel security or user isolation

Nuclear-related items covered by Category XV(a) (any article, material, equipment, or device which is specifically designed or modified for use in the design, development, or fabrication of nuclear weapons or nuclear explosive devices) could easily be interpreted to cover most, perhaps all, CCL items marked NP, *i.e.*, the Nuclear Referral List, which, pursuant to section 309(c) of the Nuclear Non-Proliferation Act, consists of items which could be of significance for nuclear explosive purposes.

APPENDIX 1-3 Changes in State (and Commerce) Lists to Conform with Wassenaar Munitions (and Dual-Use) Lists

These proposals are listed in the order in which they appear in ITAR. They start with revisions of the policy on designations of defense articles and defense services in 22 CFR 120.3. This is followed by revisions in the heading of the USML in 22 CFR 121.1; in the ITAR general guidance from 22 CFR 121.1, 121.8(a-e.g), and 121.10; and in each of the USML categories (category I is amended by 22 CFR 123.17(b)). Interpretations of categories, now appearing in 22 CFR 121.3-7, 8f, 9, and 11-15, have been moved to immediately after what is being interpreted. Revisions in Commerce Control List items (ECCNs) appear immediately after the USML category to which they relate.

This Appendix takes into account the Wassenaar Munitions List (WML) and the Wassenaar Dual-Use List (WDUL), which superseded the COCOM International Munitions List (IML) and the COCOM Industrial List (IL).

Suggested additions are shown in italics. ~~Suggested deletions are shown with strike through.~~ **These changes are not now in effect and may never be.**

120.3 Policy

An article or service ~~may~~ *shall* be designated or determined ~~in the future~~ to be a defense article (see 120.6) or defense service (see 120.9) if it:

(a) Is specifically designed, developed, configured, adapted, or modified for a military application, and *has neither*:
  (i) ~~Does not have~~ predominant civil applications, ~~and~~ *nor*
  (ii) ~~Does not have~~ performance equivalent (defined by form, fit and function) to those of an article or service used for civil applications; ~~or~~

~~(b) Is specifically designed, developed, configured, adapted, or modified for a military application, and has significant military or intelligence applicability such that control under this subchapter is necessary.~~

Rationale

Dual use items controlled for national security purposes have "significant military or intelligence applicability." Therefore,

120.3(b) nullifies the usefulness of 120.3(a) in differentiating between State and Commerce jurisdiction.

PART 121 — THE UNITED STATES MUNITIONS LIST

Heading before 121.1 — Revise as follows:

~~**Enumeration of Articles**~~

Rationale

Such headings are not used generally in the ITAR. This heading is misleading because the Munitions List includes not only defense articles but also defense services.

121.1 General. The United States Munitions List

Revise as follows:

(a) . . .

(b) . . .

(c) . . .

(d) ~~The following~~ *I*nterpretations ~~(listed alphabetically)~~ *found at the end of many of the United States Munitions List categories* explain and amplify the terms used in ~~121.1~~ *those categories*. These interpretations have the same force as if they were a part of the United States Munitions List category to which they refer.

(e) Definitions of general terms.

~~(a)~~*(1)* An "end-item" is an assembled article ready for its intended use. Only ammunition, fuel, or another energy source is required to place it in an operating state.

~~(b)~~*(2)* A "component" is an item which is useful only when used in conjunction with an end-item. A major component includes any assembled element which forms a portion of an end-item without which the end-item is inoperable. (Example: airframes, tail sections, transmissions, tank treads, hulls, etc.) A minor component includes any assembled element of a major component.

~~(c) "Accessories" and "attachments" are associated equipment for any component, end item or system, and which are not necessary for their operation, but which enhance their usefulness or effectiveness. (Examples: riflescopes, special paints, etc.)~~

~~(d)~~*(3)* A "part" is any single unassembled element of a major or a minor component, ~~accessory, or attachment~~ which is not normally

subject to disassembly without the destruction or the impairment of design use. ~~(Examples: rivets, wire, bolts, etc.)~~

~~(g)~~*(4)* A "system" is a combination of end-items, ~~components, parts, accessories, attachments, firmware or software,~~ specifically designed, modified or adapted to operate together to perform a specialized military function.

(*f*) ~~Firm ware and any related~~ *U*nique support tools (such as ~~computers~~ *firmware*, linkers, editors, test case generators, diagnostics checkers, library of functions and system test diagnostics) specifically designed for equipment or systems covered under any category of the United States Munitions List are considered as part of the end-item or component. "Firmware" includes but is not limited to circuits into which software has been programmed.

(*g*) "Software" *subject to this chapter* ~~includes but~~ is ~~not~~ limited to ~~the system functional design, logic flow, algorithms,~~ application programs

specially designed or modified for the development, production, or use of equipment or materials controlled by the Munitions List;

specially designed for:

modelling, simulation or evaluation of military weapon systems;

development, monitoring, maintenance or up-dating of "software" embedded in military weapon systems;

modelling or simulating military operation scenarios;

command, communications, control, and intelligence applications; or

for determining the effects of conventional, nuclear, chemical or biological warfare weapons

~~operating systems and support software for design, implementation, test operation, diagnosis and repair~~. A person who intends to export software only should, ~~unless~~ *whether or not* it is specifically enumerated in 121.1, apply for a technical data license pursuant to Part 125 of this subchapter. *Software meeting the conditions for technical data exemptions is eligible for those exemptions.*

(*h*) Articles on the United States Munitions List include articles in a partially completed state (such as forgings, castings, extrusions, and machined bodies) which have reached a stage in manufacture where they are clearly identifiable as defense articles. If the end-time is an article on the United States Munitions List (including

components, ~~accessories, attachments~~ and parts as defined in ~~121.8~~ *121.1(f))*, then the particular forging, casting, extrusion, machined body, etc., is considered a defense article subject to the controls of this subchapter, except for such items as ~~are in normal commercial use~~ *have performance or functionality or application essentially equivalent to that found in the commercial/civil sector.*

(i) Technical data other than software subject to this chapter is limited to what is "required" for the development, production, or use of items controlled in the Munitions List plus:

specific technology for the production of such items even if the equipment with which such technology is to be used is not controlled;

technology specific to the design of the assembly of components into, and the operation, maintenance, and repair of complete installations for the production of such items even if the components themselves are not controlled; and

specific technology described in Category XIV(f).

"Required" is defined as peculiarly responsible for achieving or exceeding the controlled performance levels, characteristics, or functions. Such "required" technology may be shared by different products.

Rationale

Line-in line-out texts are based as follows: 121.1(d) from 121.2; 121.1(e) from 121.8 (a-d,g); 121.1(f) from 121.8(e); 121.1(g) from 121.8(f); and 121.1(h) from 121.10.

121.1(d): Interpretations are less likely to be overlooked if they are placed immediately after what is being interpreted.

121.1(e): The definition of accessories and attachments is inherently vague. Since they are, by definition, not necessary for the operation of the listed component, end-item, or system to which they relate, listed specifications are not relevant. If warranted, they should be listed as separate end-items. Indeed, the examples given are separately listed: riflescopes in Category I(b) and special paints in ECCN 1C001

Since a "system" performs a specialized military function, it cannot be limited to a combination of components, parts, accessories, attachments, firmware, or software but must be a combination of end-items, which, of course, include components.

121.1(f): Computers are inherently general purpose instruments. Firmware should not logically be controlled unless it is specifically designed for something described on the Munitions List.

121.1(g): For consistency with WML 21.

121.1(h): For consistency with recommended 120.3.

121.1(i): For consistency with WML 22.

Category I—Firearms

Revise as follows:

*(a) Nonautomatic, semi-automatic, and fully automatic firearms to caliber .50 inclusive, and all components and parts for such firearms, *excluding components and parts whose performance or functionality or application is essentially equivalent to that found in the commercial/civil sector.* (See ~~121.9 and~~ 123.16-123.19).

(b) . . .

(c) . . .

(d) Technical data (as defined in 120.21) and defense services (as defined in 120.8) ~~directly~~ related *in a significant fashion* to the defense articles enumerated in paragraphs (a) through (c) of this category. (See 125.4, *126.2, 126.3, 126.4, 126.5, and 126.6* for exemptions.) Technical data ~~directly~~ related *in a significant fashion* to the manufacture or production of any defense articles enumerated ~~elsewhere~~ in this category that are designated as Significant Military Equipment (SME) shall itself be designated SME.

Interpretation

(a) Category I includes revolvers, pistols, rifles, carbines, fully automatic rifles, submachine guns, machine pistols and machine guns to caliber .50, inclusive. It includes combat shotguns. It excludes ~~other shotguns with barrels 18" or longer:~~

(1) Muskets, rifles and carbines manufactured earlier than 1938; reproductions of muskets, rifles and carbines the originals of which were manufactured earlier than 1890; and revolvers, pistols and machine guns manufactured earlier than 1890 and their reproductions.

(2) Smooth-bore weapons unless they are specially designed for military use and:

(*i*) *Are proof tested at pressures above 19,117 psi (1,300 bars);*

(*ii*) *Operate normally and safely at pressures above 14,706 psi (1,000 bars); and*

(*iii*) *Are capable of accepting ammunition above 3 inches (76.2 mm) in length (e.g., 12-guage magnum shot gun shells);*

(3) BB, pellet, and muzzle loading (black powder) firearms;

(4) Smooth-bore weapons used for hunting or sporting purposes not specially designed for military use or of the fully automatic firing type:

(5) Firearms specially designed for dummy ammunition and which are incapable of firing ammunition controlled by Category III;

(6) Weapons using non-center fire cased ammunition and which are not of the fully automatic firing type; and

(7) Weapons not of the fully automatic firing type and specially designed components and parts therefor having any of the following characteristics:

(*i*) *Rifled-bore weapons specially designed for sporting target shooting as defined in the Olympic Rules;*

(*ii*) *Rifled-bore weapons specially designed for hunting having a magazine capacity not exceeding 5 rounds;*

(*iii*) *Multiple-barrelled hunting weapons having one or more rifled-bore barrel and at least one smooth-bore barrel; or*

(*iv*) *Clips or magazines for the above weapons with a capacity not exceeding 5 rounds.*

(b)-(g) . . .

(*h*) *"Significant fashion" means peculiarly responsible to achieve or exceed the performance characteristics specified for control of a listed defense article.*

Rationale

WML 1 coverage of components is limited to those which are specially designed for embargoed weapons. The recommended category I(a) exclusion text is consistent with the text for EAA section

17(g)(5)(c) in section 108 of HR 4653 as agreed by the House and the Senate in 1990.

The Interpretation line-in line-out text is based on 121.9 and 121.8(f).

Interpretation exclusion (1) comes from existing 123.17(b), revised to conform with the comparable WML 1(a) exception.

Interpretation exclusion (2) is for consistency with WML 1 Technical Note.

Interpretation exclusion (3) is from 121.9.

Interpretation exclusions (4), (5), and (6) are the WML 1 Notes 1, 2, and 3 exclusions.

The term "directly related to" in category I(d) is insufficiently precise. A court has ruled that controlled technical data "must relate in a significant fashion to some item on the U.S. Munitions List" (U.S. v. Edler Industries, Inc. C.A. Cal. 1978, 579 F.2d 516). The only available criteria for defining "significant fashion" are the performance characteristics specified for control of listed defense articles. Based on Wassenaar agreement, Commerce uses similar language in its technology regulations.

Category II — Artillery Projectors

Revise as follows:

*(b) . . . projectors *excluding signal pistols*

(c) Components, -*and* parts, ~~accessories and attachments~~ *specially designed* for the articles in paragraphs (a) and (b), *excluding components and parts whose performance or functionality or application is essentially equivalent to that found in the commercial/civil sector.*

(d) (see I(d))

Rationale

Category II(b) - For consistency with WML 2(b) Note.

Category II(c) - Addition of "specially designed" is for consistency with WML 2 heading. The excluding clause reflects the lack of any definition of "specially designed" and is for consistency with 120.3(a)(ii).

Category III — Ammunition

Revise as follows:

*(a) Ammunition for the arms in categories I and II of this section *excluding: ammunition crimped without a projectile (blank star) and dummy ammunition with a pierced powder chamber*

(b) (see II(c))

(c) . . .

*(d) . . .

(e) (see I(d)).

Interpretation

Cartridge and shell casings are included in Category III unless, prior to export, they have been rendered useless beyond the possibility of restoration for use as a cartridge or shell casing by means of heating, flame treatment, mangling, crushing, cutting, or popping.

Related revisions in Commerce Control List

Revise ECCN 0A018.c as follows:

~~Specially designed components and parts for ammunition, except cartridge cases, powder bags, bullets, jackets, cores, shells, projectiles, boosters, fuses and components, primers, and other detonating devices and ammunition belting and linking machines all of which are controlled by the Office of Defence Trade Controls, Department of State~~

Rationale

Category III(a) — For consistency with WML 3 Note 2.

Deletion of old ECCN 0A018.c — For consistency with the "including but not limited to" wording in Category III(b).

The Interpretation text is based on 121.6.

Category IV — Launch Vehicles, Guided Missiles, Ballistic Missiles, Rockets, Torpedoes, Bombs and Mines

Revise as follows:

(a) Rockets (~~including but not limited to meteorologincal and other sounding rockets~~ *excluding civilian rockets used for research, meteorology, or other sounding purposes*), bombs, grenades, torpe-

does, depth charges, land and naval mines, as well as launchers for such defense articles, and demolition blocks and blasting caps. ~~(See 121.11.)~~

Interpretation

Military demolition blocks and blasting caps referred to in Category IV(a) do not include the following articles:

(1) Electric squibs.
(2) No. 6 and No. 8 blasting caps, including electric ones.
(3) Delay electric blasting caps (including No. 6 and No. 8 millisecond ones).
(4) Seismograph electric blasting caps (including SSS, Static-Master, Vibrocap SR, and SEISMO SR).
(5) Oil well perforating devices.

(b) ~~Launch vehicles and m~~ *M*issile and antimissile systems, including but not limited to guided, tactical and strategic missiles, ~~launchers,~~ and systems.

(c) . . . ~~(See 121.5)~~

Interpretation

Category IV includes but is not limited to the following: Fuzes and components for the items listed in that category, bomb racks and shackles, bomb shackle release units, bomb ejectors, torpedo tubes, torpedo and guided missile boosters, guidance system equipment and parts, launching racks and projectors, pistols (exploders), igniters, fuze arming devices, intervalometers, ~~thermal batteries,~~ hardened missile launching facilities, guided missile launchers and specialized handling equipment, ~~including transporters, cranes and lifts designed to handle articles in paragraphs (a) and (b) of this category for preparation and launch from fixed and mobile sites.~~ The equipment in this category includes robots, robot controllers and robot end-effectors specially designed or modified for military applications.

(d) ~~Missile and space vehicle power plants~~ *Apparatus and devices specially designed for powering with one-time operational output articles in paragraph (a) of this category.*

~~*(e) Military explosive exeavating devices.~~

~~(f) Ablative materials fabricated or semi fabricated from advanced composites (e.g., silica, graphite, carbon, carbon/carbon, and boron filaments) for the articles in this category that are derived~~

~~directly from or specifically developed or modified for defense articles.~~

(~~g~~) (*e*) . . .

(~~h~~) (*f*) (see II(c))

(~~i~~) (*g*) (See I(d))

Rationale

Category IV(a)—For consistency with "specially designed for military use" in WML 4 and with recommended 120.3 concerning designation of defense articles for military use.

Category IV(b)—For consistency with WML 4 and WDUL 9.A.4.

Category IV(d)—For consistency with WML 4.6.

Category IV(e)—There is no WML or WDUL coverage of excavating devices.

Category IV(f)—Ablative materials and semi-fabricated forms thereof are covered on the WDUL (and are on the CCL). Articles fully fabricated for military purposes are controlled elsewhere on the USML and are controlled elsewhere on the WML.

Category V—Explosives, Propellants, and Incendiary Agents

Revise as follows:

Military explosives and fuels, as follows:

*(a) Military *high* explosives ~~(See 121.12.)~~

(b) Military ~~fuel thickeners. (See 121.13)~~ *high energy solid or liquid fuels, including "aircraft" fuels specially formulated for military purposes.*

(c) *Military* ~~P~~propellants ~~for the articles in Categories III and IV of this section. (See 121.14)~~

(d) "Military pyrotechnics."

~~(e) All compounds specifically formulated for the articles in this category.~~

(~~f~~) (*e*) (See I(d))

Interpretation

1. (Text from 22 CFR 121.12 revised as follows; 121.13 and 121.14 would be deleted):

(a) . . . Military explosives, ~~military propellants and military pyrotechnics~~ and fuels in Category V ~~include~~ *are* substances or mixtures ~~containing~~ *which contain* any of the following: . . .

(c) "Precursors" include the following (*but exclude other industrial chemicals widely available in international markets*): . . .

(d) "Military pyrotechnics" (Wassenaar definition)

Notes:

1. . . .

2. The substances listed in Note 1 are controlled by Department of Commerce EAR 99 when not compounded or mixed with other "military high explosives" or powdered metals.

3. The Department of Commerce controls:

a. Magnesium or magnesium powder up to 1 kg per shipment and 5 kg per calendar year to each country;

b. Hydrazine or hydrazine derivatives up to 1 liter per shipment and 5 liters per calendar year to each country;

c. Ferrocene or ferrocene derivatives up to 50 ml per shipment and 250 ml per calendar year to each country;

d. Guanidine nitrate and 1,2,4 trihydroxybutane (1,2,4-butanetriol) up to 5 kg per shipment and 25 kg per calendar year to each country.

Related revisions in Commerce Control List

Renumber existing ECCN 1C018 as 1C918, add new 1C018, delete ECCN 1B018, and revise ECCN 2B018 and ECCN 2E018, as follows: ECCN 1C018 *Explosives, propellants, and fuels as described in this entry (also see U.S. Munitions List Category V).*

a. Metal fuels in particle size less than 60 micrometers whether spherical, atomized, spheroidal, flaked or ground, consisting of 99% or more of magnesium up to 1 kg per shipment and 5 kg per calendar year to each country;

b. Hydrazine in concentrations of 70% or more; or hydrazine derivatives up to 1 liter per shipment and 5 liters per calendar year to each country;

c. Ferrocene or ferrocene derivatives up to 50 ml per shipment and 250 ml per calendar year to each country;

d. Guanidine nitrate and 1,2,4 trihydroxybutane (1,2,4-butanetriol) up to 5 kg per shipment and 25 kg per calendar year to each country.

Note:

See ECCN 1E018 for related controlled technology for "production" of:

a. Spherical aluminum powder and metal fuels with particle size higher or purity lower than specified in 22 CFR 121.1 Category V Interpretations a.1 or a.2;
b. Hydrazine in concentrations of less than 70%;
c. Substances excluded from ITAR control by 22 CFR 121 Category V Note 2, except:
1. Difluoramine (HNF_2);
2. Potassium nitrate powder;
3. Fuming nitric acid;
4. Acetylene;
5. Propane; and
6. Liquid oxygen; or
d. Metal fuels and oxidants deposited in laminar form from the vapor phase (see paragraph a. of this ECCN and 22 CFR 121.1 Category V Interpretation a.2).

For purposes of this Note, "production" includes design, examination, manufacture, testing, and checking.

~~**ECCN 1B018**~~

~~a. Equipment for the production of military explosives and solid propellants.~~

~~1. Complete installations;~~

~~2. Specialized components (for example, dehydration presses; extrusion presses for the extrusion of small arms, cannon and rocket propellants; cutting machines for the sizing of extruded propellants; sweetie barrels (tumblers) 6 feet and over in diameter and having over 500 pounds product capacity; and continuous mixers for soild propellants); or~~

~~3. Nitrators, continuous types; and~~

~~4. Specially designed parts and accessories therefor.~~

~~b. Environmental chambers capable of pressures below (10^{-4}) Torr, and specially designed components therefor.~~

~~**ECCN 2B018** Specialized machinery, equipment, gear, and specially designed parts and accessories therefor, specially designed for the examination, manufacture, testing, and checking of arms, appliances, machines, and implements of war. Illustrative List of Specialized Machinery, Equipment, and Gear Controlled by ECCN 2B18A~~
~~Armor plate drilling machines, other than radial drilling machines~~
~~Armor plate planing machines~~
~~Armor plate quenching presses~~

~~Centrifugal casting machines capable of casting tubes 6 feet (183 cm) or more in length, with a wall thickness of 2 inches (5 cm) and over~~
~~Gun barrel rifling and broaching machines, and tools therefor~~
~~Gun barrel rifling machines~~
~~Gun barrel trepanning machines~~
~~Gun boring and turning machines~~
~~Gun honing machines of 6 foot (183 cm) stroke or more~~
~~Gun jump screw lathes~~
~~Gun rifling machines~~
~~Gun straightening presses~~
~~Induction hardening machines for tank turret rings and sprockets~~
~~Jigs and fixtures and other metal working implements or accessories of the kinds exclusively designed for use in the manufacture of firearms, ordinance, and other stores and appliances for land, sea, or acrial warfare~~
~~Small arms chambering machines~~
~~Small arms deep hole drilling machines and drills therefor~~
~~Small arms rifling machines~~
~~Small arms spill boring machines~~
~~Tank turret bearing grinding machines~~

Equipment for the "production" of products controlled by ECCNs whose fourth and fifth digits are 18, ECCNs 3A 001.e.3 and 1C005, and the U.S. Munitions List 22 CFR 121.1 except ammunition manufacturing machines and ammunition loading machines (except hand-loading ones) which are covered in U.S. Munitions List Category III(d), as follows:

a. Specially designed or modified "production" equipment and specially designed components therefor;

b. Specially designed environmental test facilities and specially designed equipment therefor, for certification, qualification, or testing.

Technical Note:

For the purposes of this ECCN, "production" includes design, examination, manufacture, testing, and checking.

NOTES:

1. Paragraphs a. and b. include the following equipment (if hand-loading):

a. Continuous nitrators;

b. Centrifugal testing apparatus or equipment having any of the following characteristics:

1. Driven by a motor or motors having a total rated horsepower greater than 400 h.p. (298 kW);

2. Capable of carrying a payload of 113 kg (250 lb) or more;

3. Capable of exerting a centrifugal acceleration of 8 g or more on a payload of 91 kg (200 lbs) or more;

c. Dehydration presses;

d. Screw extruders specially designed or modified for military explosion extrusion;

e. Cutting machines for the sizing of extruded propellants;

f. Sweetie barrels (tumblers) 1.85 m (6 ft.) and over in diameter and having over 227 kg (500 lbs) product capacity;

g. Continuous mixers for solid propellants.

h. Fluid energy mills for grinding or milling the ingredients of military explosives;

i. Equipment to achieve both sphericity and uniform particle size in metal powder listed in 22 CFR 121.1 Category V Interpretation a.1.

j. Convection current converters for the conversion of materials listed in 22 CFR 121.1 Category V Interpretation a.6.

2. Reserved.

3. Reserved.

~~Advisory Note. Licenses are likely to be approved, as administrative exceptions, for export and reexport to Country Group D:1 of equipment used to determine the safety data of explosives, as required by the International Convention on the Transport of Dangerous Goods (C.I.M.), articles 3 and 4 in Annex 1 RID, provided that such equipment will be used only by the railway authorities of current C.I.M. members, or by Government-accredited testing facilities in those countries, for the testing of explosives to transport safety standards, of the following description:~~

~~a. Equipment for determining the ignition and deflagration temperatures;~~

~~b. Equipment for steel-shell tests;~~

~~c. Drophammers not exceeding 20 kg in weight for determining the sensitivity of explosives to shock;~~

~~d. Equipment for determining the friction sensitivity of explosives when exposed to charges not exceeding 36 kg in weight.~~

ECCN 2E018

Technology *"required"* for:

a. the "use" of equipment controlled by 2B018;

b. the "production" of "products referred to" in ECCNs whose fourth and fifth digits are 18, ECCNs 3A001.e.3 and 1C005, and the U.S. Munitions List, as follows:

1. Specific "production" technology, even if the equipment with which such technology is to be used is uncontrolled;

2. Technology specific to the design of, the assembly of components into, and the operation, maintenance, and repair of complete "production" installations even if the components themselves are uncontrolled.

Technical Note:

For the purposes of this ECCN, "production" includes design, examination, manufacture, testing, and checking.

NOTES:

1. Reserved

2. a. The term "products referred to" includes:

1. Products not controlled if inferior to specified concentrations, as follows:

a. Hydrazine in concentrations less than 70%;

b. Military explosives;

2. Products not controlled if inferior to technical limits (i.e., superconductive materials excluded from control under ECCN 1C005 and superconductive electromagnets excluded from control under ECCN 3A001.e.3);

3. Metal fuels and oxidants deposited in laminar form from the vapor phase (see ECCN 1C018.a and 22 CFR 121.1 Category V Interpretation 1.a.2).

b. The term "products referred to" excludes:

1. Signal pistols (see Munitions List Category II(b));

2. Reserved

3. Reserved

4. Substances excluded from control by 22 CFR 121.1 Category V Interpretation 2 as follows:

a. Difluoramine (HNF_2);

b. Potassium nitrate-powder;

c. Fuming nitric acid;
d. Acetylene;
e. Propane; and
f. Liquid oxygen;

5. *Aero-engines certified or scheduled to be certified for civil use by aviation authorities;*
6. *Conventional steel helmets not equipped with, modified, or designed to accept any type of accessory device (see ECCN 0A018.f);*
7. *Equipment fitted with uncontrolled industrial machinery, such as coating machinery not elsewhere specified and equipment for the casting of plastics;*
8. *Muskets, rifles, and carbines dated earlier than 1938, reproductions of muskets, rifles, and carbines dated earlier than 1890, revolvers, pistols, and machine guns dated earlier than 1890, and their reproductions (this listing does not allow the export of technical data for non-antique small arms, even if used to produce reproductions of antique small arms);*
9. *References in 22 CFR 120-130 to any exceptions from control other than those specified in Note 2.A above.*

3. Subparagraph (d) above does not include technology for civil purposes, such as agricultural, pharmaceutical, medical, veterinary and environmental, and in the food industry.

Rationale

For consistency with WML 8 and WML 18.

2E018 overlaps proposed 22 CFR 121.1(i) because of uncertainty whether the Government considers that this technology is under Commerce or State jurisdiction.

Category VI — Vessels of War & Special Naval Equipment

Revise as follows:

*(a) ~~Warships, amphibious warfare vessels, landing craft, mine warfare vessels, patrol vessels,~~ *Combatant vessels* and ~~any~~ vessels *(surface or underwater)* specifically designed or modified for ~~military purposes~~ *offensive or defensive action, whether or not converted to non-military use, regardless of current state of repair or operating condition, and whether or not they contain weapon*

delivery systems or armor, and hulls or parts of hulls for such vessels. ~~(See 121.15.)~~

~~(b) Patrol craft without armor, armament, or mounting surfaces for weapons systems more significant than .50 caliber machine guns or equivalent and auxiliary vessels. (See 121.15.)~~

Interpretation ~~(121.15 . . .)~~

~~Vessels of war means vessels, waterborne or submersible, designed, modified, or equipped for military purposes, including vessels deseribed as developmental, "demilitarized" or decommissioned. Vessels of war in Category VI, whether developmental, "demilitarized" and/or decommissioned or not, include, but are not limited to, the following: . . .~~

Patrol craft with armor, armament, or mounting surfaces for weapons systems of .50 caliber machine guns or equivalent or less are not "significant military equipment."

*(c) Turrets and gun mounts, arresting gear, special weapons systems, protective systems, submarine storage batteries, catapults, ~~mine sweeping equipment(including mine countermeasures equipment deployed by aircraft) and other significant naval systems specifically designed or modified for combatant vessels.~~

(d) ~~Harbor entrance~~ *Underwater* detection devices, (magnetic, pressure, and acoustic ones) *specially designed for military use* and controls *and specially designed components* therefor *excluding controls and components whose performance or functionality or application is essentially equivalent to that found in the commercial/civil sector.*

*(e) Naval nuclear propulsion plants, their land prototypes, and special facilities for their construction support, and maintenance. This includes any machinery, device, component, or equipment ~~specifically developed, designed or modified~~ for use in such plants or facilities *excluding any machinery, device, component, or equipment whose performance or functionality or application is essentially equivalent to that found in the commercial/civil sector.* (See 123.20.)

(f) (See II(c))

(g) See I(d).

Related revisions in Commerce Control List ECCN 8A018.b

~~4. Marine boilers designed to have any of the following characteristies:~~

a. ~~Heat release rate (at a maximum rating) equal to or in excess of 190,000 BTU per hour per cubic foot of furnace volume; or~~

b. ~~Ratio of steam generated in pounds per hour (at maximum rating) to the dry weight of the boiler in pounds equal to or in excess of 0.83; and~~

5. . . .

6. Components, ~~parts, accessories, and attachments~~ specially designed for the above.

Rationale

For consistency with WML 9 and with recommended 22 CFR. 120.3.

Category VII — Tanks and Military Vehicles

Revise as follows:

*(a) Military type armed or armored vehicles, ~~military~~ *armored* railway trains, and vehicles specifically designed or modified to accommodate mountings for arms or other specialized military equipment or fitted with such items.

*(b) Military tanks, ~~combat engineer vehicles,~~ bridge launching vehicles, half tracks *specially designed or modified for military use,* and gun carriers.

*(f) Amphibious vehicles. (~~See 121.4.~~)

Interpretation

An "amphibious vehicle" in Category VII(f) is an automotive vehicle or chassis which embodies all-wheel drive, is equipped to meet special military requirements, and which has sealed electrical systems or adaptation features for deep water fording.

*(g) Engines ~~specifically designed or modified~~ *specially designed* for the vehicles in paragraphs (a), (b), (c), and (f) of this category *excluding engines whose performance or functionality or application is essentially equivalent to that found in the commercial/civil sector.*

(h) (See II (c))

(i) See I(d)

Related revisions in Commerce Control List ECCN 9A018.b

Vehicles specially designed or modified for military purposes. (See 770 Interpretation 8.) Commodity Interpretation

. . .

(iii) Parts for military automotive vehicles:

~~Functional parts are defined as those parts making up the power train of the vehicles, including the electrical system, the cooling system, the fuel system, and the control system (brake and steering mechanism), the front and rear axle assemblies including the wheels, the chassis frame, springs and shock absorbers.~~ (Parts ~~specifically designed~~ *specifically designed* for military automotive vehicles on the Munitions List, *excluding components whose performance or functionality or application is essentially equivalent to that found in the commercial/civil sector,* are licensed for export by the U.S. Department of State.)

(c) . . .

Rationale

For consistency with IML 6 and recommended 120.3.

Category VIII

Revise as follows:

Category VIII — Aircraft and Associated Equipment

*(a) Aircraft . . . specifically designed, ~~modified, or equipped~~ for military purposes. This includes . . . the following military purposes: . . . *airborne* refueling, . . . ~~aerial mapping,~~ . . . cargo ~~carrying or~~ dropping, ~~personnel dropping, airborne warning and~~ ~~control,~~ and military training. *This excludes aircraft certified by the Federal Aviation Administration.* ~~(See 121.3.)~~

Interpretation

In Category VIII, "aircraft" means aircraft designed, ~~modified, or equipped~~ for a military purpose, including *such* aircraft described as "demilitarized" *except drones used for military training purposes, which are included in category IX.* All aircraft bearing an original military designation are included in Category VIII. However, the following aircraft are not included so long as they have not been specifically equipped, re-equipped, or modified for military operations:

(a)*(1)* Cargo aircraft bearing "C" designations and numbered C-45 through C-118 inclusive, C-121 through C-125 inclusive, and C-131, using reciprocating engines only.

(~~b~~)*(2)* Trainer aircraft bearing "T" designations and using reciprocating engines or turboprop engines with less than 600 horsepower (s.h.p.).

(e)*(3)* Utility aircraft bearing "U" designations and using reciprocating engines only.

(d)*(4)* All liaison aircraft bearing an "L" designation.

(e)*(5)* All observation aircraft bearing "O" designations and using reciprocating engines.

*(b) Military aircraft engines, except reciprocating engines, ~~specifically designed or modified for the aircraft in paragraph (a) of this category~~ *specially designed for military use except engines certified or scheduled to be certified for civil use by aviation authorities and engines whose performance or functionality or application is essentially equivalent to that found in the commercial/civil sector.*

(c) (See II (c))

(d) (See II(c))

*(e) Inertial navigation systems . . . specifically designed, modified or configured for military use, *except those certified by the Federal Aviation Administration,* and all specially designed components, ~~parts and accessories~~ *for such systems (the components of inertial navigation systems are not significant military equipment) excluding systems and components whose performance or functionality or application is essentially equivalent to that found in the commercial/civil sector.* For other inertial reference systems and related components refer to Category XII(d).

*(f) (See II(c))

~~(g) Ground effect machines (GEMS) specifically designed or modified for military use, including but not limited to surface effect machines and other air cushion vehicles, and all components, parts, and accessories, attachments, and associated equipment specifically designed or modified for use with such machines.~~

(h) (See II(c))

(i) (See I(d))

Rationale

For consistency with WML 10.

Category VIII(a): Non-airborne refueling, aerial mapping, cargo carrying, personnel dropping, and airborne warning and control are normal civil functions.

Category VIII(e) components not being significant military equipment: For consistency with Category VIII(h).

Category VIII(e) FAA certification: For consistency with EAA section 17(c).

Category VIII(g): For consistency with WDUL 8A001.g, which reads:

Surface-effect vehicles, . . .

121.3 (Interpretation) drones: Training drone aircraft are not significant military equipment.

Category IX—Military Training Equipment

Revise as follows:

(a) Military training equipment including but not limited to . . . , ~~radar target trainers, radar target generators, . . . operational flight trainers, . . . radar trainers, navigation trainers~~.

(b) (See II(c))

(c) (See I(d))

Related revisions to Commerce Control List

~~9A018.f. Military instrument flight trainers, except for combat simulation; and components, parts, attachments and accessories specially designed for such equipment.~~

Related Controls: . . . (b) ~~Instrument flight trainers for combat simulation are subject to the export licensing authority of the Office of Defense Trade Controls, U.S. Department of State. See 22 CFR part 121 category VIII.~~

Rationale

Category IX(a): Radar, operational flight, and navigation training are normal civil functions.

Deletion of ECCN 9A018.f: For consistency with "including but not limited to" in category IX(a).

Category X—Protective Personnel Equipment

Revise as follows:

(a) Body armor specifically designed, modified or equipped for military use; ~~articles, including but not limited to clothing, designed, modified or equipped to protect against or reduce detection by radar, infrared (IR) or other sensors,~~ military helmets equipped with . . ., excluding standard military helmets.

(b) Partial pressure suits and liquid oxygen converters used in aircraft in Category VIII(a).

(c) Protective ~~apparel and~~ equipment specifically designed ~~or modified~~ for use with the articles in paragraphs (a) through (d) in Category XIV.

(d) (See II(c))

(e) (See I(d))

Rationale

Category X(a): Neither the WML nor the WDUL specifies control of articles to protect against or reduce detection by sensors, other than materials to absorb electromagnetic waves, controlled by WDUL I.C.I (and ECCN 1C001).

Category X(c): WML 7(e,f) controls equipment specially designed for defense against the toxicological agents described in Category XIV but does not control apparel.

Category X(d): WML 10.F does not control components.

Category XI

Revise as follows:

Category XI — Military Electronics

(a) Electronic equipment not included in Category XII of the Munitions List which is specifically designed, ~~modified or configured~~ for military ~~application~~ *use.* This equipment includes but is not limited to:

*(1) Underwater sound equipment ~~to include:~~ active and passive ~~detection, identification, tracking, and~~ weapons control equipment.

(2) . . .

(3) ~~Radar systems with capabilities such as:~~

~~*(i) Search,~~

~~*(ii) Acquisition,~~

~~*(iii) Tracking,~~

~~*(iv) Moving target indications,~~

~~*(v) Imaging radar systems, and~~

~~*(vi) Any ground air traffic control radar which is specifically designed or modified for military application.~~

(4) . . .

~~*(5) Command, control and communications systems to include transceivers, navigation, and identification equipment.~~

~~(6) Computers specifically designed or developed for military application and any computer specifically modified for use with any defense article in any category of the U.S. Munitions List.~~

(7) Any experimental or developmental electronic equipment specifically designed ~~or modified~~ formilitary ~~application~~ *use,* ~~or specifically designed or modified for use with a military system and~~

(b) Electronic systems or equipment specifically designed, ~~modified, or configured for intelligence, security, or military purposes for use in search, reconnaissance, collection, monitoring, direction-finding, display, analysis and production of information from the electromagnetic spectrum and electronic systems or equipment designed or modified~~ to counteract electronic surveillance and monitoring.

~~A system meeting this definition is controlled under this subchapter even in instances where any individual pieces of equipment constituting the system may be subject to the controls of another U.S. Government agency. Such systems or equipment described above include, but are not limited to, those:~~

~~(1) Designed or modified to use cryptographic techniques to generate the spreading code for spread spectrum or hopping code for frequency agility. This does not include fixed code techniques for spread spectrum.~~

~~(2) Designed or modified using burst techniques (e.g., time compression techniques) for intelligence, security or military purposes.~~

~~(3) Designed or modified for the purpose of information security to suppress the compromising emanations of information-bearing signals. This covers TEMPEST suppression technology and equipment meeting or designed to meet government TEMPEST standards. This definition is not intended to include equipment designed to meet Federal Communications Commission interference standards or equipment for health and safety.~~

(c) (See II(c))

(d) (See I(d))

Rationale

For consistency with WML 11.

Category XI(a)(1): Detection, identification, and tracking are normal civil uses.

Category XI(a)(3): Search, acquisition, tracking, moving target indications, imaging, and air traffic control are normal civil uses for radar.

Category XI(a)(5): Command, control, communications, navigation, and identification are normal civil functions.

Category XI(a)(6) & (7): Equipment modified for use with a defense article or a military system goes beyond the heading of (a), which is limited to specifically designed for military use. Modifications "for use with" might not affect functionality so that the equipment would remain dual-use.

Category XI(b): For consistency with WDUL coverage of most equipment controlled for intelligence or security purposes. For example ECCN 5A002.a.4, a.5, and a.6 cover spread spectrum and user-isolation equipment and ECCNs 4A003.g and 5A001.b.10 cover time compression (see definition of "signal processing").

Category XII—Fire Control, Range Finder, Optical and Guidance and Control Equipment

Revise as follows:

*(a) Fire control systems; gun and missile tracking and guidance systems; gun range, position, height finders, spotting instruments and laying equipment; aiming devices (electronic, optic, and acoustic); bomb sights, bombing computers, military television sighting and viewing units, and periscopes *specially designed* for the articles of this section.

*(b) ~~Lasers specifically designed, modified or configured for military application including those used in military communication devices, target designators and range finders, target detection systems, and directed energy weapons.~~ *Kinetic energy weapon systems specially designed for destruction or effecting mission-abort of a target.*

~~*(c) Infrared focal plane array detectors specifically designed, modified, or configured for military use; image intensification and other night sighting equipment or systems specifically designed, modifed, or configured for military use; second generation and above military image intensification tubes (defined below) specifically designed, developed, modified, or configured for military use, and~~

~~infrared, visible, and ultraviolet devices specifically designed, developed, modified, or configured for military appliction. . . .~~
~~Note: Special Definition. For purposes of this subparagraph, second and third generation image intensification tubes are defined as having:~~

~~A peak response within 0.4 to 1.05 micron wavelength range and incorporating a microchannel plate for electron image amplification having a hole pitch (center to center spacing) of less than 25 microns, and having either:~~

~~(a) An S-20, S-25 or multialkali photocathode; or~~

~~(b) A semiconductor photocathode;~~

*(d) Inertial platforms and sensors for weapons or weapon systems; ~~guidance, control and stabilization systems except for those systems covered in category VIII; astrocompasses and star trackers and military accelerometers and gyros.~~ For aircraft inertial reference systems and related components refer to Category VIII.

(e) Components~~,~~ *and* parts, ~~accessories, attachments, and associated equipment specifically designed or modified~~ for the articles in paragraphs (a), (b), (c), and (d) of this category, ~~except for such items as are in normal commercial use~~ *excluding components and parts whose performance or functionality or application is essentially equivalent to that found in the commercial/civil sector.*

(f) (See I(d)).

Rationale

Category XII(b): For consistency with WML 12.a; most lasers are dual-use, e.g., communication, target designation and detection, and range finding are normal civil functions.

Category XII(c): See ECCN 6A002 for infrared, visible, and ultraviolet devices.

Category XII(d): Guidance, control, and stabilization are normal civil functions (see ECCNs 7A001-7A003). Astro compasses and startrackers are covered by ECCN 7A004.

Category XIII - Auxiliary Military Equipment Revise as follows:

(a) (See II(c))

(c) Self-contained diving and underwater breathing apparatus as follows:

(1) Closed and semi-closed circuits (rebreathing) apparatus;

(2) (See II(c))

(3) Articles exclusively designed for military use with self-contained diving and underwater swimming apparatus.

(d) Carbon/carbon billets and preforms which are reinforced with continuous unidirectional tows, tapes, or woven cloths in three or more dimensional planes (i.e. 3D, 4D, etc.)-., ~~This is~~ exclusive of carbon/carbon billets and preforms where reinforcement in the third dimension is limited to interlocking of adjacent layers only, and carbon/carbon 3D, 4D etc. end items which have not been specifically designed or modified for defense articles (e.g., brakes for commercial aircraft or high speed trains), *and other* structural materials including carbon/carbon and metal matrix composites, plate, forgings, castings, welding consumables and rolled and extruded shapes which have been *sufficiently fabricated to be identifiable as* specifically designed or modified for defense articles. Armor (e.g., organic, ceramic, metallic) and reactive armor which has been specifically designed or modified for defense articles.

~~(e) Concealment and deception equipment, including but not limited to special paints, decoys, and simulators and components, parts and accessories specifically designed or modified therefor.~~

~~(f) Energy conversion devices for producing electrical energy from nuclear, thermal, or solar energy, or from chemical reaction which are specifically designed for military application.~~

~~(g) Chemiluminescent compounds and solid state devices specifically designed or modified for military application.~~

(h) Devices embodying particle beam and electromagnetic pulse technology ~~and associated components and subassemblies (e.g., . . .)~~ which are ~~specifically designed or modified for directed energy weapon applications~~ *capable of destruction or effecting mission-abort of a target.*

~~(i) Metal embrittling agents.~~

(j) . . .

(k) (See I(d)).

Related revisions to Commerce Control List

ECCN 8A018

~~a. Closed and semi closed circuit (rebreathing) apparatus for diving and underwater swimming, and specially designed components for use in the conversion of open circuit apparatus to military use.~~

Rationale

Category XIII(a) and (c): For consistency with recommended 120.3.

Category XIII(d): For consistency with 121.10 (moved to 121.1(f) above).

Category XIII(e): Neither the WML nor the WDUL specifies the control of concealment or deception equipment.

Category XIII(f): For consistency with WDUL 3A1e1 (and ECCN 3A01Ae1) and WML 4(b) (see Category IV(d) above).

Category XIII(g): Neither the WML nor the WDUL specifies the control of chemiluminescent compounds. Solid state devices are controlled by WML 11 (and Category XI).

Category XIII(h): For consistency with WML 23(b,c).

Category XIII(i): Neither the WML nor the WDUL specifies the control of metal embrittling agents.

ECCN 8A018.a: For consistency with Category XIII(c) and WML 17.a.

Category XIV — Toxicological Agents and Equipment and Radiological Equipment

Revise as follows:

*(a) Chemical agents *adapted for use in war to produce casualties in men or animals or to damage crops,* including . . . ~~(See 121.7.)~~

Interpretations

(1) A chemical agent in Category XIV(a) is a substance having military application which by its ordinary and direct chemical action produces a powerful physiological effect.

(2) The term "chemical agent" includes, but, *except as provided in Interpretation (3) below,* is not limited to, the following chemical compounds: (a) through (f).

(3) the term "chemical agent" excludes the following:

(A) Cyanogen chloride
(B) Hydrocyanic acid
(C) Chlorine
(D) Carbonyl chloride (phosgene)
(E) Diphosgene (trihchloromethyl-chloroformate)
(F) Ethyl bromoacetate
(G) Xylyl bromide

(H) Benzyl bromide
(I) Benzyl iodide
(J) Bromoacetone
(K) Cyanogen bromide
(L) Bromo methylethylketone
(M) Chloro acetone
(N) Ethyl-iodoacetate
(O) Iodo acetone
(P) Chloropicrine
(Q) Substances listed in Department of Commerce ECCNs IC350

*(b) Biological agents *adapted for use in war to produce casualties in men or animals or to damage crops except for those listed in Department of Commerce ECCNs* IC351, IC352, IC353 or IC354.

*(c) Equipment for dissemination, detection, and identification of, and defense against, the articles in paragraphs (a) and (b) of this category *except equipment listed in Department of Commerce ECCNs* ZB350, ZB351, or ZB352.

*(d) Nuclear radiation detection and measuring devices, manufactured to military specification, *except personal radiation monitoring dosimeters.*

(e) (See II(c))

(f) (See I(d)).

Rationale

Category XIV(a,b): For consistency with WML 7.a and with ECCNs IC350 to IC354.

Category XIV(a) Interpretation: For consistency with WML 7 Note 3.

Category XIV(c): For consistency with ECCNs 2B350 to 2B352.

Category XIV(d): For consistency with WML 7.f Note.

Category XV Spacecraft Systems ~~and Associated Equipment~~

Revise as follows:

(d) Global Positioning System . . . for military use; ~~or GPS receiving equipment with any of the following characteristies: . . .~~

(e) Components~~,~~ *and* parts, ~~accessories, attachments, and associated equipment (including ground support equipment)~~ as

follows: (1) Specifically designed, modified, or configured for the articles in paragraphs (a) through (d) of this category *excluding components and parts whose performance or functionality or application is essentially equivalent to that found in the commercial/civil sector.*

(f) Technical data (see I(d).)

Related revisions to Commerce Control List

ECCN 7A005 Global navigation satellite systems (i.e. GPS or GLONASS) receiving equipment *having any of the following characteristics* and specially designed components therefor. ~~(These items are subject to the export licensing authority of the U.S. Department of State, Office of Defense Trade Controls. See 22 CFR part 121).~~

a. Employing on/decryption; or

b. A null-steerable antenna.

Rationale

For consistency with 120.3 and with WDUL 7.A.5

Category XVI Nuclear Weapons Design and Test Equipment

Revise as follows:

(a) Any article equipment, or device which is specifically designed or modified for use in the design, development, or fabrication of nuclear weapons or nuclear explosive devices. (See 123.21 and Department of Commerce Export Regulations 15 CFR part ~~778~~ *744*).

(b) Any article, material, equipment, or device which is specifically designed or modified for use in the devising, carrying out, or evaluation of nuclear weapons tests or any other nuclear explosions, ~~except such items as are in normal commercial use for other purposes~~ *excluding articles, materials, equipment, or devices whose performance or functionality or application is essentially equivalent to that found in the commercial/civil sector.*

(c) (See I(d))

123.21(a). . . . Nuclear Regulatory Commission *or the Department of Commerce.*

Rationale

For consistency with Commerce controls pursuant to section 309(c) of the Nuclear Non Proliferation Act.

Category XX — Submersible Vessels, Oceanographic and Associated Equipment

Revise as follows:

(a) . . .

(b) . . .

(c) Equipment, components, *and* parts, ~~accessories and attachments~~ specifically designed or modified for any of the articles in paragraphs (a) and (b) of this category *except equipment, components or parts whose performance or functionality or application is essentially equivalent to that found in the commercial/civil sector.*

(d) (See I(d))

Category XX(c): For consistency with 120.3.

Category XXI

Delete as follows:

~~**Category XXI — Miscellaneous Articles**~~

~~Any article not specifically enumerated in the other categories of the U.S. Munitions List which has substantial military applicability and which has been specifically designed or modified for military purposes. The decision on whether any article may be included in this category shall be made by the Director of the Office of Defense Trade Controls.~~

Rationale

There is no WML control of items simply because they have substantial military applicability and have been specifically designed or modified for military purposes. This would literally cover boots for soldiers or olive drab paint. Its reasonable purpose, namely, to cover new military designs, can be met through contractual restrictions if the development is under government contract. The wording of Category XXI is too imprecise to provide guidance to a private developer as to what is subject to control and what is not.

121.2 — 121.15

Transfer as follows (revisions shown under the section to which they are transferred):

121.2 Interpretations of the United States Munitions List.

To 121.1(e), revised.

121.3 Aircraft and related articles.

To category VIII(a), revised.

121.4 Amphibious vehicles.

To category VII(f), no change.

121.5 Apparatus and devices under Category IV(c).

To category IV(c), revised.

121.6 Cartridge and shell casings.

To category III, no change.

121.7 Chemical agents.

To category XIV(a), revised.

121.8(a-d,g) End-items, components, accessories, attachments, parts, and systems.

To 121.1(f), revised.

121.8(e) Firmware.

To 121.1(h), revised

121.8(f) Software.

To 121.1(g), revised.

121.9 Firearms.

To category I, revised.

121.10 Forgings, castings and machined bodies.

To 121.1(h), revised.

121.11 Military demolition blocks and blasting caps.

To category IV(a), no change.

121.12 Military explosives.

To category V(a), revised.

121.13 Military fuel thickeners.

Deleted.

121.15 Vessels of war and special naval equipment.

Deleted.

Rationale
Place interpretations next to what is being interpreted.

Chapter 2:
Munitions Controls

Chapter 2:
Munitions Controls

CHAPTER 2

MUNITIONS CONTROLS

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Table 2-2 Notice Concerning Requests For Forms

Table 2-3 Decision Tree to Determine Required Action Under ITAR

Appendix 2-1 Anomalies in the International Traffic in Arms Regulations

2.1 INTRODUCTION

The U.S. Department of State (State or DOS) controls the export of munitions. Because of the permanence of munitions controls and the need for flexibility in responding to new technologies, the United States Munitions List (USML), included as part 121 of the International Traffic in Arms Regulations (ITAR), has been drafted in relatively general terms, so that it does not need to be revised frequently. One result is that many items on the USML are not described using the same terminology as appears in the multilaterally agreed Wassenaar Munitions List (WML). Some of these differences involve USML coverage of items in wide civil as well as military use and give rise to conflicts of jurisdiction with the Commerce Control List (CCL). Another result is that inconsistencies or anomalies within ITAR go unremedied for years.[1]

The United States exports more arms than any other country. Nevertheless, State munitions controls are more restrictive than Commerce controls on the export of other items. Not only is a license required before a munitions item may be exported, but a firm must register with State's Office of Defense Trade Controls (DTC) before engaging in any munitions manufacturing, exporting, or importing activities. Licenses are also required to provide defense services or to enter into technical assistance or manufacturing license agreements, even if no article or technical data is exported. A foreign importer of a significant military item must execute a Non-Transfer and Use Certificate as a pre-condition for a U.S. license to export many U.S. munitions items. ITAR exceptions or exemptions from license requirements are less liberal than those in Commerce regulations. For example, there is no *de minimis* munitions license exception for trivial U.S. content in a foreign-made item.

More countries are subject to arms embargoes than are subject to embargoes of other items. There are no deadlines for processing munitions export license applications. Long delays are often experienced. One reason for delay is that Congress must be notified of high dollar value proposed arms exports before they are licensed. Another is that DTC consults with the Department of Defense prior to acting on license applications. Although DTC procedures typically follow a predictable course, they can become opaque when difficult questions

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[1] Appendix 2-1 *infra* contains a detailed analysis of ITAR anomalies.

are presented by the proposed transaction. Even when there are no other problems, delays are caused by staff shortages in DTC.

As a matter of policy, items on the USML are limited to those specifically designed for a military application and most items with a predominant civil application are controlled by Commerce rather than by State. However, as noted above, in practice many items with wide civil applications are on the U.S. Munitions List. For example, after a brief respite from DTC regulation, Congress recently legislated the return of commercial communications satellites from Commerce to State jurisdiction. As this book went to press, differences of opinion between Commerce and State as to whether this transfer included "space qualified" components were being adjudicated at the White House.

State has jurisdiction not only over exports but also over temporary imports, which are followed by exports, or temporary exports, which are followed by imports. However, the Bureau of Alcohol, Tobacco and Firearms (BATF) in the Treasury Department controls the permanent import of munitions and, in some types of transactions, has concurrent jurisdiction with DTC.[2] BATF's U.S. Munitions Import List (USMIL) is substantially shorter than ITAR's USML.

ITAR requires licenses for brokering activities that facilitate arms manufacture, export, or import. One unusually restrictive regulation even requires that a person who knows or has reason to know of specified brokering activities must so inform the State Department.

This chapter describes munitions export controls administered by DTC under the authority of the Arms Export Control Act (AECA),[3] with particular reference to control of commercial exports under ITAR.[4] This Chapter also describes munitions import controls administered by BATF.[5]

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[2] See section 2.8 *infra*.

[3] 22 U.S.C. §§ 2751-2796.

[4] 22 U.S.C. § 2778-2994 and 22 C.F.R. § 120-130.

[5] The following aspects of munitions export controls are referred to in other Chapters:

- Overlapping jurisdiction between State munitions and other controls in section 1.2.1 and Appendices 1-1, 1-2, and 1-3 in Chapter 1.
- Transaction types controlled by State and jurisdiction exercised and not exercised by State in Tables 1-3, 1-4, and 1-5 and sections 1.4.1 and 1.4.2 in Chapter 1.

This chapter takes into account a major revision of ITAR which became effective July 22, 1993, and the less sweeping, yet also significant, changes which have been made in those Regulations since then, up to the May 1, 2000, cutoff date for this Fourth Edition.

The AECA describes policies not only on commercial exports, in which a private party is the exporter, but also on Government sales to foreign countries. The latter are generally referred to as Foreign Military Sales (FMS). Although the Government is the contracting party for FMS, private parties often participate in FMS transactions.

Policy with respect to FMS includes the following:[6]

> . . . an ultimate goal of the United States (is) a world which is free from . . . the burdens of armaments. . . . (It is, therefore,) the policy of the United States to encourage regional arms control and disarmament agreements and to discourage arms races. The Congress recognizes, however, . . . the need for international defense cooperation. . . . Accordingly, . . . this chapter authorizes sales by the United States Government to friendly countries . . . in furtherance of the security objectives of the United States and of the purposes and principles of the United Nations Charter (and) consistent with the foreign policy interests of the United States, the purposes of the foreign assistance program of the United States. . . , the military requirement, and the economic and financial capability of the recipient. . . .

Policy with respect to commercial export of arms is described more briefly:[7]

- State munitions-related steps (2)(d), (5), (6), (13), and (14) in the Table 1-6 Decision Tree to Determine Agency Jurisdiction.
- Changes in State and Commerce lists which would be necessary to conform with Wassenaar Munitions and Dual-Use Lists and with the policy on designating a defense article or defense service in 22 C.F.R. § 120.3 in Appendix 1-3.
- Differences between State and Commerce regulatory schemes concerning enforcement in Chapter 8.
- Enforcement of munitions controls in section 8.7 in Chapter 8.

[6] 22 U.S.C. § 2751.
[7] 22 U.S.C. § 2778(a)(1).

> In furtherance of world peace and the security and foreign policy of the United States. . . .

The definitions of "defense article" and "defense service" for FMS[8] are, in some respects, broader than for commercial exports, but even the latter are broad enough to cover many items listed on the Commerce Control List.[9]

The definition of "export" in ITAR includes activity which may not entail physical removal or even a transfer of possession, *e.g.*, transferring to a foreign person, wherever located, registration or control of an aircraft, vessel, or satellite or disclosing technical data to a foreign person, wherever located.

2.2 EXCEPTIONS AND EXEMPTIONS

Exceptions from ITAR controls apply to all destinations, whereas exemptions from these controls generally apply only selectively to favored destinations. What is excepted or exempted from State licensing is generally subject to Commerce jurisdiction.[10] Commerce requires a license for a few ITAR excepted or exempted items to all destinations except Canada. Significant items transferred from State are designated SI on the Commerce Control List (CCL). However, most ITAR excepted or exempted items are less rigorously controlled by Commerce Export Administration Regulations (EAR); some require a Commerce license only to embargoed destinations; and a few, such as most publicly available technology, do not require a license from any U.S. Government agency to any destination.

Exceptions from ITAR license requirements applicable to all destinations and disposition in ECCNs or EAR99 on the CCL, in Commerce License Exceptions, or "not subject to the EAR" and therefore not requiring a U.S. license to any destination are as follows:

- Specified aircraft types and components: ECCNs 9A018.a and 9A991.[11]

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[8] Described in section 1.2.1.5.3 in Chapter 1.

[9] See section 1.2.1.5 and Appendices 1-1, 1-2, and 1-3 in Chapter 1.

[10] 15 C.F.R. § 734.3 and section 1.2.1.5.2 in Chapter 1.

[11] 22 C.F.R. § 121.1 Category VIII(a), (f), and (h) and 22 C.F.R. § 121.3.

- Electronic and fire control equipment components in normal commercial use: many ECCNs and EAR99.[12]
- Forgings, castings, and machined bodies in normal commercial use: many ECCNs and EAR99.[13]
- Cartridge and shell casings rendered useless: ECCN 0A018.c.[14]
- Non-combatant shotguns, BB, pellet, and muzzle-loading firearms: ECCNs OA018e, OA984, and OA986.[15]
- Specified firearms for personal use: Commerce License Exception BAG.[16]
- Technical data in the public domain; approved for public release; general scientific, mathematical or engineering principles; basic marketing information: not subject to the EAR.[17]
- Mere travel outside the United States by a person whose personal knowledge includes technical data: no comparable Commerce exception.[18]

The above statement that exceptions apply to all destinations may appear inconsistent with the ITAR provision that, with the exception of 123.17 and 125.4(b)(13), "exemptions" do not apply to proscribed countries.[19] However, exceptions[20] are not identified in ITAR as "exemptions."

On the other hand, approval of a manufacturing license agreement or a technical assistance agreement is required before a U.S. person furnishes to any foreign person, in the United States or abroad, "assistance,"[21] even if that assistance relies on technical data in the

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[12] 22 C.F.R. § 121.1 Categories XI(d) and XII(f).

[13] 22 C.F.R. § 121.10.

[14] 22 C.F.R. § 121.1 Category III(b), 22 C.F.R. § 121.6, and 15 C.F.R. § 770.2(g).

[15] 22 C.F.R. § 121.1 Category I(a) and 22 C.F.R. § 121.9(a).

[16] 22 C.F.R. § 123.17(c,d,e); 15 C.F.R. § 740.14.

[17] 22 C.F.R. § 120.11 and 125.1(a), 22 C.F.R. § 125.4(b)(13), 22 C.F.R. § 120.10(5), 22 C.F.R. § 120.10(5); exclusion from "subject to the EAR" of publicly available information 15 C.F.R. § 734.3(b)(3), License Exception TSU 15 C.F.R. § 740.13.

[18] 22 C.F.R. § 120.17(1).

[19] 22 C.F.R. § 126.1(a).

[20] 22 C.F.R. § 120.17(1), 120.10(5), 121, and 125.1(a).

[21] "Assistance" is defined in 22 C.F.R. § 120.9(1).

"public domain" or "is otherwise exempt from the (ITAR) licensing requirements."[22]

In addition, in a case of exceptional or undue hardship, or when it is otherwise in the interest of the U.S. Government, the State Department may make an exception to any ITAR provision.[23]

2.3 COUNTRY DIFFERENTIALS

ITAR treats Canada more favorably than other countries.[24] Conversely, ITAR prohibits exports to, and temporary imports from, many countries.[25] The list of countries subject to a denial policy changes frequently:

- Destinations added:
  Yugoslavia July 11, 1991.
  Haiti October 9, 1991.
  Sudan October 8, 1992.
  Yemen November 16, 1992.
  Cyprus armed forces, except UN forces November 18, 1992.
  Somalia December 16, 1992.
  Liberia December 18, 1992.
  Zaire April 29, 1993.
  Burma June 16, 1993.
  Nigeria July 30, 1993.
  China Ministry of Aerospace Industry August 27, 1993.
  Pakistan Ministry of Defense August 27, 1993.
  UNITA Angola September 29, 1993.
  Three entities in Thailand (import sanctions) February 8, 1994.
  Rwanda May 27, 1994.
  Peru (lethal items) June 8, 1994.
  Ecuador and Peru February 23 and May 16, 1995.
  Nigeria December 21, 1995.
  Afghanistan June 27, 1996.
  Afghanistan, Cuba, Iran, Iraq, Libya, North Korea, Sudan, and Syria May 22, 1997.

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[22] 22 C.F.R. § 124.1(a).
[23] 22 C.F.R. § 126.3.
[24] 22 C.F.R. § 126.5.
[25] 22 C.F.R. § 126.1.

India May 20, 1998.
Pakistan June 17, 1998.

- Destinations renamed:
  Successor states to the Soviet Union July 22, 1993.
- Destinations removed:
  Chile, Poland, Hungary, Czechoslovakia, East Germany, South Yemen October 19, 1991.
  Angola July 2, 1993 (but note UNITA addition September 29, 1993).
  Albania, Bulgaria, Cambodia, Estonia, Latvia, Lithuania, Romania April 4, 1994.
  South Africa June 8 and August 17, 1994.
  Ecuador and Peru November 13, 1995.
  Russia May 3, 1996.
  Former Yugoslavia except Serbia and Montenegro July 12, 1996.
  Georgia, Kazakhstan, Kyrgyzstan, Moldova, Turkmenistan, Uzbekistan August 9, 1996.
  Ukraine August 12, 1996.
  Mongolia July 11, 1997.

The destinations currently prohibited by ITAR are as follows:

- Published in ITAR:[26]
  Afghanistan
  Angola (UNITA)
  Armenia
  Azerbaijan
  Belarus
  Burma
  China
  Cuba
  Haiti
  Iran
  Iraq
  Liberia

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[26] 22 C.F.R. § 126.1(a). Cuba, Iran, Iraq, Libya, North Korea, Sudan, and Syria are also designated in 126.1(d) as supporting international terrorism. A May 23, 1997, Federal Register notice also included Afghanistan as terrorist supporting.

Libya
North Korea
Rwanda
Somalia
Sudan
Syria
Tajikistan
Turkmenistan
Vietnam
Federal Republic of Yugoslavia (Serbia and Montenegro)

- Published in the Federal Register, but not in ITAR:[27]
  Cyprus
  India
  Indonesia
  Nigeria
  Pakistan
  Yemen

In addition to identified proscribed countries, the prohibition policy applies "whenever an export would not otherwise be in furtherance of world peace and the security and foreign policy of the United States."[28] Exemptions not available for proscribed countries are available in such cases. Such non-availability applies to proscribed countries or areas, not to prohibited exports to countries not otherwise proscribed.

Sanctions against specified firms in proscribed countries[29] are of no practical effect on munitions since the entire countries

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[27] The 126.1 list is illustrative. Omission from that list does not invalidate separate Federal Register notices concerning other destinations. A July 19, 1993, Federal Register notice announced review on a case-by-case basis of exports to Guatemala. Such announcements are literally superfluous, because all munitions exports to all destinations except Canada are reviewed on a case-by-case basis. However, an announcement indicates a heightened concern, albeit less than an arms embargo. Guatemala is included in the list for special restrictive treatment concerning brokering activities 22 C.F.R. § 129.5(c). The September 10, 1999, notice suspending licenses and approvals to Indonesia excepted commercial communication satellites and Y2K compliance activities.

[28] 22 C.F.R. § 126.1(a).

[29] Such as those which became effective against several Chinese firms on Oct. 19, 1999.

are proscribed. However, sanctions against specified firms in non-proscribed countries do have a practical effect.[30]

It is U.S. policy to deny licenses and other approvals with respect to export of any defense articles or defense services to any proscribed country. This denial policy is a statutory requirement for terrorist-supporting countries. Exports of items on the U.S. Munitions List are prohibited to any country which State has determined, for purposes of EAA foreign policy controls, "has repeatedly provided support for acts of international terrorism"[31] unless the President waives the prohibition by a determination that a particular export is important to the U.S. national interest. Any waiver expires after 90 days unless Congress enacts a law extending it.[32]

2.3.1 Canada

Licenses are generally not required for munitions exports to Canada. However, licenses are required for the following items on the U.S. Munitions List:[33]

- Firearms and ammunition.
- Missiles and rockets, but not bombs, grenades, torpedoes, depth charges, or land and naval mines.
- Nuclear weapons delivery systems.
- Nuclear weapon design and test equipment.
- Naval nuclear propulsion equipment.

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[30] Such as missile sanctions against various entities in Russia which became effective Aug. 4, 1998, and Mar. 26, 1999, and sanctions for transferring lethal military equipment to a state sponsor of terrorism which became effective against various entities in Kazakhstan on November 17, 1999, Executive Order 12163, as amended, on Nov. 17, 1999. Missile proliferation sanctions are required by sections 1702 and 1703 of the National Defense Authorization Act for Fiscal Year 1990-1991, Pub. L. No. 101-510. Chemical and biological warfare sanctions were enacted as part of Pub. L. No. 102-182 in 1991. Lethal military equipment to a state sponsor of terrorism sanctions are required by section 620H of the Foreign Assistance Act of 1961 22 U.S.C. § 2378, as supplemented most recently by section 551 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, Pub. L. 105-277 (1999).

[31] EAA § 6(j).

[32] 22 U.S.C. § 2780.

[33] 22 C.F.R. § 126.5(b).

- Aircraft.
- Military information security systems.
- Toxicological agents and equipment and radiological equipment.
- Spacecraft.
- Classified articles, technical data, and defense services.
- Submersible and oceanographic vessels.
- Items on the Missile Technology Control Regime Annex.
- Items for use by a foreign national other than a Canadian.[34]
- Any defense service.[35]
- Any export for which congressional notification is required.[36]

Additional requirements related to Canada include:[37]

- Registration.[38]
- Exporter eligibility.[39]
- Shipper's Export Declaration.[40]
- Written documentation that the defense article is for end-use in Canada by a Canadian citizen.
- Non-transfer and use assurance.[41]
- Records maintenance.[42]

2.3.2 Other Non-Proscribed Destinations

Non-proscribed countries enjoy the following exemptions:[43]

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[34] 22 C.F.R. § 126.5(c).
[35] 22 C.F.R. § 126.5(d).
[36] 22 C.F.R. § 126.5(e).
[37] 22 C.F.R. § 126.5(f).
[38] 22 C.F.R. § 122.1.
[39] 22 C.F.R. § 120.1(c).
[40] 22 C.F.R. § 123.22.
[41] 22 C.F.R. § 123.10.
[42] 22 C.F.R. § 122.5.
[43] These exemptions from State controls might be construed as being under Commerce jurisdiction; but a Commerce License is not required for any of them to non-proscribed destinations except that an ECCN 0A018.e Note requires such a license for firearms manufactured between 1890 and 1898.

- Antique firearms.[44]
- Packing cases.[45]
- Specified firearms for personal use of U.S. Government personnel.[46] Classified or unclassified technical data:
  —By or for U.S. Government.[47]
  —Pursuant to previous technical data approvals:
    —Manufacturing license or technical assistance agreement.[48]
    —Editorial revisions.[49]
    —Related to approved classified data.[50]
    —Plant visit.[51]
  —Return to sender.[52]
  —From U.S. corporation to U.S. employee overseas.[53]
- Unclassified technical data:
  —Related to previous commodity approval.[54]
  —Use information for firearms not in excess of caliber .50.[55]
  —From institutions of higher learning in the United States to foreign employees in the United States.[56]
- Other commodity exemptions:

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[44] 22 C.F.R. § 123.17(b). Appendix 1-3 describes the revision needed to conform with Wassenaar Munitions List (WML) Item 1.a.

[45] 22 C.F.R. § 123.16(b)(3).

[46] 22 C.F.R. § 123.18; Commerce License Exceptions GOV and BAG are relevant, including special rules on shotguns 15 C.F.R. §§ 740.11(b)(2)(i,ii) and 740.14(e).

[47] 22 C.F.R. §§ 125.4(b)(1, 3, 9, 11) and 126.4; Commerce 15 C.F.R. §§ 740.11(b)(1)(i, ii).

[48] 22 C.F.R. § 125.4(b)(2).

[49] 22 C.F.R. § 125.4(b)(4); Commerce License Exception TSU software updates 15 C.F.R. § 740.13(c).

[50] 22 C.F.R. § 125.4(b)(8).

[51] 22 C.F.R. § 125.5.

[52] 22 C.F.R. § 125.4(b)(7); Commerce License Exception TMP per 15 C.F.R. § 740.9(b)(3,4) and ENC 740.17.

[53] 22 C.F.R. § 125.4(b)(9); Commerce License Exception TMP to U.S. subsidiary 15 C.F.R. § 740.9(a)(2)(ix).

[54] 22 C.F.R. § 125.4(b)(5); operation technology and software portion of Commerce License Exception TSU 15 C.F.R. § 740.13(a).

[55] 22 C.F.R. § 125.4(b)(6).

[56] 22 C.F.R. § 125.4(b)(10); Commerce "educational information" excluded from "subject to the EAR" per 15 C.F.R. § 734.9 but deemed export if "subject to the EAR" 15 C.F.R. § 734.2(b)(2)(ii).

—By or for U.S. Government.[57]
—U.S. Government foreign military sales.[58]
—Under approved manufacturing or technical assistance agreements except for Significant Military Equipment (SME).[59]
—Spare parts valued at $500 or less.[60]
—Intra-company transfers of components sent abroad for assembly except for SME.[61]
—Temporary imports for repair and servicing.[62]
—Items previously licensed for temporary export to trade shows except for SME.[63]
—Temporary export for personal use of cryptographic products.[64]

Controls on exports of arms must take into consideration violations of internationally recognized human rights.[65] This could affect exports to some non-proscribed countries. It is perhaps intended to be covered in the ITAR denial policy whenever an export would not otherwise be in furtherance of world peace and the security and foreign policy of the United States.[66]

More explicit regulatory provision is probably considered unnecessary because, unlike the formal designations of countries supporting terrorism, no country has been formally designated as abusing human rights. Commerce must also take human rights into consideration.[67] Commerce regulations state the following licensing policy:[68] Applications for items controlled under this section will generally be considered favorably on a case-by-case basis unless there is evidence that the government of the importing country may have violated internationally recognized human rights and that

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[57] 22 C.F.R. § 126.4; Commerce 15 C.F.R. § 740.11(b)(1)(i) and (b)(1)(ii).
[58] 22 C.F.R. § 126.6.
[59] 22 C.F.R. § 123.16(b)(1).
[60] 22 C.F.R. § 123.16(b)(2).
[61] 22 C.F.R. § 123.16(b)(9); Commerce 15 C.F.R. § 740.9(a)(2)(ix).
[62] 22 C.F.R. § 123.4(a).
[63] 22 C.F.R. § 123.16(b)(5).
[64] 22 C.F.R. § 123.27; see restrictions on comparable Commerce License Exceptions in 15 C.F.R. §§ 740.9(a)(2)(i), 770.2(m), 740.14(d) last sentence, and 740.14(f).
[65] Section 502B of the Foreign Assistance Act of 1961, as amended.
[66] 22 C.F.R. § 126.1(a).
[67] EAA § 6(n).
[68] 15 C.F.R. § 742.7(b).

the judicious use of export controls would be helpful in deterring the development of a consistent pattern of such violations or in distancing the United States from such violations.

2.3.3 China

Except for several years in the mid-1980s, the People's Republic of China has been included on the ITAR list of proscribed countries.[69]

Statutory sanctions require continued suspension of licenses of any defense article on the U.S. Munitions List unless the President reports to Congress progress on political reform in China or a national interest determination to terminate the suspension.[70]

In the late 1990s, technology was transferred to China intended to identify reasons for failures in attempted Chinese launches of U.S. communications satellites. Questions arose as to whether these transfers were properly authorized and whether they were harmful to U.S. national security. The Congress thereupon transferred jurisdiction for the export of communications satellites from Commerce to State. This might seem irrational, because the technology at issue had been, and continues to be, under State jurisdiction. However, the value of such satellites exceeds the threshold for prior notification to Congress if on the U.S. Munitions List. So the jurisdictional transfer strengthens Congressional oversight (and will also delay license processing).

2.3.4 Iraq

Effective August 2, 1990, all licenses and approvals to export or otherwise transfer defense articles and defense services to Iraq were revoked (Federal Register, August 3, 1990 at 31,808). Executive Orders of August 2 and August 9 prohibited exports and directed suspension or termination of licenses.

Effective October 29, 1991, Iraq was added to the list of countries supporting terrorism[71] and, effective July 22, 1993, it was added to the list of prohibited countries.[72]

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[69] 22 C.F.R. § 126.1(a).

[70] Pub. L. No. 101-246, § 902(a)(3), 22 U.S.C. § 2151.

[71] 22 C.F.R. § 126.1(d).

[72] 22 C.F.R. § 126.1(a).

2.3.5 Yugoslavia and Haiti

Effective July 11, 1991, licenses and approvals to export to Yugoslavia were suspended, including manufacturing licenses and technical assistance agreements.[73] Effective July 12, 1996, former Yugoslavia except Serbia and Montenegro was removed from the list of proscribed destinations.

Effective October 3, 1991, Haiti was added to the list of ITAR prohibited destinations.[74] Despite political changes since then, Haiti remains an ITAR-proscribed country in 2000.[75]

2.4 SIGNIFICANT ITEMS

The only proscribed munitions item is landmines specifically designed for anti-personnel use.[76] However, many items are identified as significant military equipment (SME) "for which special export controls are warranted because of their capacity for substantial military utility or capability."[77]

Prior approval is required before making a proposal or presentation involving the export of significant military equipment and various other conditions must be met.[78] This regulation assists the Executive Branch to comply with the statutory requirement to report high value prospective sales to the Congress.[79] Congressional notification is required for:[80]

> All exports of major defense equipment . . . sold under a contract in the amount of $14,000,000 or more, or exports of defense articles and defense services sold under a contract in the amount of $50,000,000 or more. . . .

Major defense equipment is defined as:[81]

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[73] 56 Fed. Reg. 33322 (July 19, 1991).
[74] 56 Fed. Reg. 50968 (Oct. 9, 1991).
[75] 22 C.F.R. § 126.1(a).
[76] Pub. L. No. 102-484, effective Nov. 25, 1992.
[77] 22 C.F.R. § 120.7.
[78] 22 C.F.R. § 126.8.
[79] 22 U.S.C. § 2776.
[80] 22 C.F.R. § 123.15(a).
[81] 22 U.S.C. § 2794(6) and 22 C.F.R. § 120.8.

> . . . any item of significant military equipment . . . on the U. S. Munitions List having a nonrecurring research and development cost of more than $50,000,000 or a total production cost of more than $200,000,000.

Thus, SME items are subject to a lower dollar value threshold for reporting prospective sales to Congress than non-SME items. Despite the word "equipment" in the SME expression, this term also includes technical data related to equipment identified as SME. Many technical data entries on the U.S. Munitions List include the following:[82]

> Technical data directly related to the manufacture or production of any defense articles enumerated elsewhere in this category that are designated as Significant Military Equipment (SME) shall itself be designated as SME.

In addition to the requirement for a pre-proposal approval, a non-transfer and use certificate (DSP-83) must support all license applications for the permanent export of significant military equipment.[83]

2.5 TYPES OF LICENSES AND PREREQUISITES

There are six ITAR forms to license (or authorize) different types of exports; one type of export approval without a standard form; two forms for prerequisites; and two types of prerequisites without a standard form.

The six license (or authorization) forms are:

1. Application/License for permanent export of unclassified defense articles and technical data Form DSP-5.[84]
2. Application/License for temporary import (and subsequent export) of unclassified defense articles Form DSP-61.[85]

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[82] 22 C.F.R. § 121.1 Categories I(e), II(d), III(e), IV(i), V(f), VI(g), VII(i), VIII(i), XI(d), XII(f), XIII(k), XIV(f), XV(f), XVI(c), and XX(d).

[83] 22 C.F.R. § 123.10(a).

[84] This form, dated November 1992 and introduced in 1993, includes, on the back, the required Certification Letter that there is no conviction, indictment, or ineligibility to declare 22 C.F.R. § 126.13 and the required statement on political contributions, fees or commissions. 22 C.F.R. § 130.

[85] 22 C.F.R. §§ 123.1, 123.3, and 123.4.

3. Application/License for temporary export of unclassified defense articles Form DSP-73.[86]
4. Application/License for permanent or temporary export or for temporary import (and subsequent export) of classified defense articles and technical data Form DSP-85.[87]
5. Authority to Export Defense Articles and Defense Services sold under the Foreign Military Sales (FMS) program Form DSP-94.[88]
6. Application for amendment to license Form DSP-119.[89]

The one export approval without a standard form is Approval of Manufacturing License Agreement or Technical Assistance Agreement, which is a prerequisite for furnishing "assistance," as distinguished from furnishing "technical data," to foreign persons, wherever located, and which provides the basis for furnishing both "assistance" and "technical data" without a formal "license."[90]

The two prerequisite forms are:

1. Statement of registration Form DSP-9.[91]
2. Non-Transfer and Use Certificate Form DSP-83.[92]

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[86] 22 C.F.R. §§ 123.1 and 123.5.

[87] 22 C.F.R. § 125.7.

[88] 22 C.F.R. § 126.6.

[89] 22 C.F.R. § 123.25.

[90] 22 C.F.R. §§ 124.1 and 124.3. Information to be provided is specified in 22 C.F.R. §§ 124.7-124.12.

[91] Generally; any person manufacturing or exporting defense articles or furnishing defense services must register with the Office of Defense Trade Controls 22 C.F.R. § 122.1. A draft transmittal letter is at Table 2-1 *infra*.

[92] Form DSP-83 must support:

— An application for a license to export "significant military equipment." 22 C.F.R. § 123.1(c)(5)
— An application for a license to export classified defense articles or classified technical data. 22 C.F.R. § 125.3(a)
— A request for approval of a signed manufacturing license agreement or technical assistance agreement which relates to significant military equipment, classified defense articles, or classified technical data. 22 C.F.R. § 124.10

A DSP-83 may be required to support an application for the export of any other defense articles or defense services 22 C.F.R. § 123.10(b); but the requirement to submit a DSP-83 with a proposed agreement was dropped on June 10, 1994.

The two prerequisites without a form are:

1. Request for approval of an agreement for warehousing and distribution.[93]
2. Request for approval of proposal to sell, or enter into a manufacturing license agreement or technical assistance agreement involving, significant military equipment.[94]

A notice that forms may be obtained in person, by mail request, or by Fax request, but not by telephone request is reproduced at Table 2-2 below.

Features from the State pattern of licensing which have no Commerce counterpart include requirements for:

- Registration not only by would-be exporters but also by manufacturers or service providers with no export expectations.
- Approval of proposed manufacturing license or technical assistance agreements.
- Approval of proposals to engage in major transactions.

Additional requirements for the State distribution and warehousing agreement as compared with the Commerce Special Comprehensive License (SCL) include:

- Obtaining approval of the agreement before submitting a license application.
- Limitation of distribution to governments.
- For any significant military equipment, submission to the U.S. Government of a completed Non-transfer and Use Certificate before any transfer takes place.

2.6 DECISION TREE

The decision tree at Table 2-3 consists of a series of questions with yes or no answers. Its purpose is to assist in determining

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[93] Such a request is normally a prerequisite for a license to export defense articles to a warehouse or distribution point outside the United States for subsequent resale 22 C.F.R. § 123.7. Information to be provided is specified in 22 C.F.R. § 124.14.

[94] 22 C.F.R. § 126.8(a,b). Information to be provided is specified in 22 C.F.R. § 126.8(d,e).

what action an exporter should take under ITAR. The information presented amounts to a recapitulation of the foregoing portions of this Chapter.

Table 2-3 starts after a determination has been made, per Table 1-6 in Chapter 1, that a proposed transaction is under ITAR jurisdiction.

If a retransfer is desired for a State-controlled item for which a Non-transfer and Use Certificate had been provided, *i.e.*, Table 1-6, Question 5, then submit to the Office of Defense Trade Controls (DTC) a request for specific authorization to "resell or otherwise dispose" of the item, pursuant to the statement to that effect in the certification on the DSP-83 which supported the original export from the United States. In addition, submit a new DSP-83 Non-transfer and Use Certificate, executed by the proposed new enduser.

If the proposed transaction is intended to evade a munitions export control, *i.e.*, Table 1-6, Question 14, DON'T DO IT!

If the proposed transaction is any of the other types subject to ITAR, *i.e.*, Table 1-6, Questions 2(d), 6, or 13, then follow the steps in Table 2-3.

2.7 ADMINISTRATION

DTC is the principal government agency responsible for U.S. munitions controls. Administrative procedures are described in ITAR.

2.7.1 Office of Defense Trade Controls

The Office of Defense Trade Controls (DTC) in the Bureau of Political-Military Affairs of the Department of State administers ITAR. DTC and the Office of Defense Trade Policy (DTP) comprise the Center for Defense Trade (CDT).

2.7.1.1 Contact with Public

DTC's address is PM/DTC, Department of State, Washington, D.C. 20520, located at 2401 E Street, N.W., Washington, D.C. The public may reach DTC by telephone at (202) 663-2700 from 2 p.m. to 5 p.m.[95]

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[95] Also see section 2.7.5.2 *infra* for different hours for seeking the status of a case.

2.7.1.2 Contact with Other Agencies

DTC consults closely with the Department of Defense on the composition of the Munitions List and on licensing decisions. Other agencies and other offices within the State Department are consulted on technical or foreign policy questions.

2.7.2 Jurisdictional Questions

In case of doubt whether State or Commerce has jurisdiction, informal consultation with licensing officers in each agency often resolves the problem. If informal means are unsuccessful, an exporter may seek a formal determination by a written classification request to DTC in five copies, accompanied by ample technical description.[96] Under this procedure, State consults with Commerce and Defense.

An exporter believing that a product should be moved from State to Commerce jurisdiction might wish to provide justification to both agencies.

2.7.2.1 Concurrent Jurisdiction

If both State and Commerce claim jurisdiction, the exporter could file applications with each, taking care to provide identical descriptions to both. If one agency issues a license and the other denies, the exporter should so inform the denying agency before shipment.

2.7.2.2 Dual-Use Components

Components used in both military products on the USML and civil products on the CCL might appear to be under the jurisdiction of both agencies. Efforts to differentiate include designation of components as "specially designed" (or some similar expression) for a listed product. However, except for definitions which are limited to terms as used for Missile Technology Control Regime purposes, there is no consensus on the meaning of such expressions. A second formulation is the exception from some USML entries of components "in normal commercial use." Two other formulations appear in an ITAR provision which is not part of the USML, namely,

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[96] 22 C.F.R. § 120.4.

predominant civil applications and performance equivalent (defined by form, fit and function) to those of an article or service used for civil applications.[97]

2.7.3 Registration

ITAR contains the following registration requirement:[98]

> Any person who engages in the United States in the business of either manufacturing or exporting defense articles or furnishing defense services is required to register with the Office of Defense Trade Controls. Manufacturers who do not engage in exporting must nevertheless register.

However, the following are exempted from this registration requirement:[99]

- U.S. Government personnel.
- Producers of unclassified technical data.
- Persons whose activities are licensed under the Atomic Energy Act.
- Fabricators of articles for experimental or scientific purposes, including research and development.

2.7.3.1 Registration Procedure

A Registration Statement (Form DSP-9) must be submitted[100] together with a transmittal letter, which must contain specified information[101] and a fee.[102]

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[97] 22 C.F.R. § 120.3(a).

[98] 22 C.F.R. § 122.1(a). See section 2.7.8 *infra* for registration requirements for brokers.

[99] 22 C.F.R. § 122.1(b).

[100] 22 C.F.R. § 122.2(a).

[101] 22 C.F.R. § 122.2(b).

[102] 22 C.F.R. § 122.3. Fees are $600 for one year, $1,200 for two years, $1,800 for three years, and $2,200 for four years.

2.7.3.2 Post-Registration Requirements

A registrant must notify DTC of changes in information furnished.[103]

Registration must be renewed periodically, the period varying from one to four years, depending upon the amount of the fee paid.[104] Records must be maintained and be available for inspection by DTC, the Diplomatic Security Service, or Customs.[105]

2.7.4 Other Prerequisites

Information on political contributions, fees, and commissions exceeding specified amounts is required. An Import Certificate may be required.

2.7.4.1 Contributions, Fees, and Commissions

Each applicant must inform DTC as to whether the applicant or its vendors have paid, or offered or agreed to pay, in respect of any sale for which a license or approval is requested:[106]

- Political contributions in an aggregate amount of $5,000 or more.
- Fees or commissions in an aggregate amount of $100,000 or more.

2.7.4.2 Import Certificate

The Department of State may require that the government of the importing country provide an Import Certificate for a proposed export to a non-government entity in a country participating in this procedure.[107]

2.7.5 Processing License Applications

Applications are reviewed by DTC and, unless there are adequate precedents, by Defense.

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[103] 22 C.F.R. § 122.4.
[104] 22 C.F.R. § 122.3.
[105] 22 C.F.R. § 122.5.
[106] 22 C.F.R. § 130.9(a)(1).
[107] 22 C.F.R. § 123.14.

2.7.5.1 Delays

Extensive delays may be experienced. There are no case processing deadlines, similar to those applicable to Commerce license applications. Therefore, applications should be filed as far in advance of the desired shipping date as possible and exporters should avoid contractual commitments to a hard and fast delivery date.

2.7.5.2 Status of Cases

An exporter may obtain the case number assigned to the application by stapling a self-addressed, stamped postcard to the upper left corner of the application by the narrow edge. It will be returned with the case number.

Unless the case is being processed on an emergency basis, applicants should wait three weeks before making a status inquiry. Telephone inquiries at State (703 875-6644) are answered from 8:30 a.m. to 11 a.m. and from 2 p.m. to 5 p.m.

DTC may, on request, indicate that Defense is reviewing the case and the date it was transmitted to Defense. Applicants should normally wait 30 days before making a status inquiry at Defense. Telephone inquiries at Defense (202 695-3554) are answered from 8:30 a.m. to 4 p.m.

2.7.5.3 Precautions Against Denial

A clause in a contract with a customer that refers specifically to license denial as a *force majeure* can relieve an exporter of liability for failure to perform if the U.S. government does not issue a license. Less specific *force majeure* provisions may not suffice for this purpose.

2.7.5.4 Who May Apply

Only U.S. persons or foreign government entities in the United States may apply, except for requests for retransfer approvals.[108]

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[108] 22 C.F.R. § 120.1(c).

2.7.6 License Validity

The validity period for licenses is four years. The license expires when the total value or quantity authorized has been shipped or when the date of expiration has been reached, whichever occurs first.[109]

2.7.6.1 No Renewals

Shipments after expiration of the validity period require a new application and license.[110]

2.7.6.2 Amendments

A license may be revoked, suspended, or amended without prior notice, whenever the Department of State deems such action advisable.[111]

The exporter may apply to amend an export license (DSP-5), a temporary import license (DSP-61), or a temporary export license (DSP-73), but not a classified license (DSP-85).[112] Types of amendments that will be considered are as follows:

- Addition of a U.S. freight forwarder or U.S. consignee.
- Correction of obvious typographical errors.
- Change in source of the commodity.
- Change of foreign intermediate consignee transporting but not processing the equipment.

Types of amendments that will not be approved are as follows:

- Additional quantity.
- Commodity.
- Country of ultimate destination.
- End-use or end-user.
- Foreign consignee.
- Foreign intermediate consignee for technical data.

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[109] 22 C.F.R. § 123.21(a).
[110] 22 C.F.R. § 123.21(a).
[111] 22 C.F.R. § 126.7(a).
[112] 22 C.F.R. § 123.25.

2.7.7 Responsibilities After License Issuance

Reproductions of approved licenses may be made for record-keeping purposes only, not for making shipment. Licenses are not transferable.

The exporter shall incorporate the following statement as an integral part of the Shipper's Export Declaration, the bill of lading, and the invoice:[113]

> These commodities are authorized by the U.S. Government for export only to (country of ultimate destination). They may not be transferred, transshipped on a non-continuous voyage, or otherwise be disposed of in any other country, either in their original form or after being incorporated into other end-items, without the prior written approval of the U.S. Department of State.

Before shipping, the exporter must deposit the license and file a shipper's export declaration with the district director of customs at the port of exit.[114] For shipments by mail, an authenticated Shipper's Export Declaration (SED) must be endorsed by the postmaster or exporter to show shipments made.[115]

A SED is not required for unclassified technical data.[116]

The Department of State may require the U.S. exporter to furnish a Delivery Verification document from the government of the importing country.[117]

The exporter must return to the Department of State unused, expired, expended, suspended, or revoked licenses.[118]

The exporter must maintain records for five years.[119]

2.7.8 Brokering Activities

Registration and licensing of persons brokering activities concerning defense articles and defense services is required.[120]

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[113] 22 C.F.R. § 123.9(b).
[114] 22 C.F.R. § 123.22.
[115] 22 C.F.R. §§ 123.22(d) and 123.24.
[116] 22 C.F.R. § 123.22(c).
[117] 22 C.F.R. § 123.14.
[118] 22 C.F.R. §§ 123.21(b) and 123.24.
[119] 22 C.F.R. § 122.5 and 130.14.
[120] AECA § 38(b)(1)(A)(ii) and 22 C.F.R. § 129.

A "broker" is defined as an agent in arranging contracts, purchases, sales, or transfers in return for a fee or other consideration.

A person who engages in brokering activities must register, even if already registered as a manufacturer or an exporter. Carriers, freight forwarders, or banks who merely transport, arrange transportation, or provide commercially available credit are exempted from the registration requirement; but any person directly involved in arranging arms deals or holding title to defense articles, even when no physical custody is involved, must register.

"Brokering activities" are defined to include financing, transportation, freight forwarding, or any other action that facilitates manufacture, export, or import. This includes activities by U.S. persons wherever located or by foreign persons subject to U.S. jurisdiction involving items of U.S. or foreign origin wherever located. This excludes activities by U.S. persons limited to domestic sales or transfers which are neither for export nor for retransfer in the United States to a foreign person.

Written approval of DTC is required for brokering activities or brokering proposals involving any proscribed country listed in ITAR,[121] listed in Federal Register notices, or subject to a U.N. Security Council arms embargo or involving any debarred individual. Any person who knows or has reason to know of such activities must immediately inform the Office of Defense Trade Controls.

Except for activity for use by a U.S. Government agency or for carrying out an authorized foreign assistance or sales program, a license is required for:

- Activity involving fully automatic firearms, specified nuclear and missile items, or classified items to or from any country.
- Activity involving foreign items or significant military equipment valued at $1,000,000 or more and a country other than a NATO member, Australia, New Zealand, or Japan.

This license requirement may be met by a license for export or temporary import of the item, provided the names of all brokers were identified in the license application.

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[121] 22 C.F.R. § 126.1.

Prior notification is required for brokering activity with respect to significant military equipment valued at less than $1,000,000 except for basic marketing information.

Persons other than a registered "broker" are subject to "brokering activities" approval or license requirements. This is because a person who merely transports, arranges transportation, or provides commercially available credit need not register, whereas those activities are included in the definition of "brokering activities." However, this may not be the intent, since the registration exclusion applies to persons "whose business activities do not also include brokering defense articles or defense services."

In any event, requirements for approval of brokering proposals and for prior notification for brokering activity apply before any brokering activity has taken place and could affect persons not yet required to register. Moreover, the requirement to inform DTC of knowledge of specified brokering activities could affect persons not even contemplating engaging in brokering activities themselves.

"Brokering activities" requiring a State license differ somewhat from similarly described activities requiring a Treasury or Commerce license.[122]

2.8 TRANSACTIONS IN FIREARMS AND MUNITIONS IMPORTS

As we have seen above, U.S. manufacturers, exporters, importers, and brokers of most defense articles must be registered with the Office of Defense Trade Controls, U.S. Department of State. Moreover, the vast majority of their transactions require prior approval or licensing by that agency. Under the ITAR, however, DTC's jurisdiction over imports of defense articles is limited to temporary imports of these items. Permanent imports into the U.S. and some exports of some defense articles are regulated by the Bureau of Alcohol, Tobacco and Firearms, U.S. Treasury Department (BATF). In some transactions, approval of both DTC and BATF is required.

BATF's regulations are wholly independent of the ITAR. Companies that manufacture, buy, export, or import firearms, destructive devices, ammunition, or related items must comply with

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[122] See sections 1.2.1.1 and 1.2.1.5 *supra* in Chapter 1.

BATF regulations, and must register with BATF as an importer, manufacturer, or dealer in firearms, and obtain associated licenses and permits to import, or transfer such items.

2.8.1 BATF Organization

BATF has three major operating organizations: (1) the Import Branch in Washington, D.C.; (2) the National Firearms (NFA) Branch in Washington, D.C.; and (3) the National Licensing Center in Atlanta, Georgia. The Gun Control Act of 1968 and the Federal Firearms Regulations administered by BATF regulate the sale of firearms both domestically and internationally, as well as providing for the monitoring of the production, import, and export of such devices. In addition to specific licensing requirements, there are detailed procedures for the maintenance of certain manufacturing records and inventory logs, the obtaining of BATF approval prior to the shipment of each item sold either domestically or abroad, and the use of BATF-approved methods of serialization for the munitions.

The following two BATF documents are indispensable to BATF registrants:

1. Federal Firearms Regulations Reference Guide.[123]
2. ATF Explosives Law and Regulations.[124]

2.8.2 Registration

Companies engaging in the business of permanently importing defense articles identified on the U.S. Munitions Import List (USMIL), including firearms, ammunition, or firearms parts, must register with BATF by completing a Form 4587. The form must be completed in duplicate with an original signature on both copies, enclosing a check payable to the "Bureau of Alcohol, Tobacco and Firearms." The BATF registration cost for each involved facility is $250 for one year; $500 for two years; $700 for three years; $850 for four years; or $1,000 for five years. The duplicate Forms 4587 and check are to be sent to: Bureau of Alcohol, Tobacco and Firearms, P.O. Box 73198, Chicago, Illinois 60673.

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[123] ATF P 5300.4 (10-95) contains 22 C.F.R. §§ 47, 178, and 179.

[124] ATF P 5400.7 (6-90) contains 18 U.S.C. § 40 and 27 C.F.R. § 55.

Companies engaging in the business of permanently importing, manufacturing, or dealing in firearms coming within the purview of the National Firearms Act (NFA) must also register with BATF. A separate license must be obtained for each of a registrant's locations. Foreign subsidiaries and other foreign units are not required to register. NFA Firearms include missiles, missile launchers, machine guns, destructive devices, etc. Registration is accomplished by completing a Form 5630.7, paying a special (occupational) tax annually using IRS Form 11 for manufacturers, enclosing the fee, and forwarding the application to Bureau of Alcohol, Tobacco and Firearms, Attn NFA, P.O. Box 371970, Pittsburgh, Pennsylvania 15250-7960.

2.8.3 Permanent and Temporary Imports

BATF controls the permanent importation of defense articles identified in the U.S. Munitions Import List (USMIL).[125] These regulations relate to that portion of section 38, Arms Export Control Act of 1976, as amended, that relates to the importation of arms, ammunition and implements of war. Missiles, artillery weapons, cluster bombs, and ammunition are among those explosives, which are defined as "destructive devices." The USMIL consists of the ITAR's U.S. Munitions List (USML), less the following: Categories VIII(b) - VIII(j), IX - XIII, XVII, and XXI, which are considered inapplicable to BATF permanent import controls.

The BATF Import Branch must approve a Form 7 license and a Form 6 Part I Application and Permit for Importation of Firearms, Ammunition and Implements of War. An application for a Form 7 license requires submission of a fingerprint card. The application is submitted through the BATF Licensing Office in Atlanta, Georgia. A Form 6 is required for each importation, before the Defense Article identified on the USMIL may be permanently imported into the United States.

ATF Form 2, Notice of Firearms Manufactured or Imported, is used to register all firearms imported, manufactured, remanufactured or reactivated by qualified federal firearms licensees who have paid the special (occupational) tax to import or manufacture firearms.

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[125] 22 C.F.R. § 47 Subpart C.

Permanent imports of defense articles that are not on the USMIL and that do not include firearms or explosives are not controlled by BATF.

Temporary intransit imports of firearms or explosives require the approval of both DTC (DSP-61 license or exemption) and BATF (a Form 7 license and a separate Form 6 Part I Permit for each importation).

Other temporary imports of defense articles are controlled by DTC under the ITAR and do not require BATF approval.

2.8.4 Permanent Exports of Explosives

Permanent exports of explosives require both a permanent export license from DTC (a DSP-5 or exemption for unclassified Defense Articles or a DSP-85 for classified Defense Articles) and a permanent export permit (ATF Form 9) from the BATF National Firearms Branch.

2.8.5 Key Definitions

The following four definitions are fundamental to a basic understanding of BATF regulations:

(1) "Ammunition" means ammunition or cartridge cases, primers, bullets, or propellant powder designed for use in any firearms. Not included are shotgun shot for hunting purposes, projectiles for target shooting, and projectile cores for industrial purposes, including oil well perforating.

(2) "Destructive Device" means any explosive, incendiary, or poison gas, bomb, grenade, rocket having a propellant charge of more than four ounces, missile having an explosive or incendiary charge of more than one-quarter ounce, mine, or device similar to any of the preceding devices.

(3) "Export," means (a) sending or taking any firearm, destructive device, or ammunition out of the United States; or (b) transferring in the United States to any embassy, agency, or subdivision of a foreign government.

(4) "Firearm" means (a) any weapon (including a starter gun) which will, or is designed to or may readily be converted to, expel a projectile by the action of an explosive; (b) the frame or receiver of any such weapon; (c) any firearm muffler or firearm silencer; or

(d) any destructive device. Self-contained missile launchers such as TOW may fall within this definition. This term does not include an antique firearm.

2.8.6 Operating Procedures for BATF Registrants

BATF registrants must pay occupational taxes and mark and serialize their products.

2.8.6.1 Occupational Taxes

The regulations require every importer, manufacturer, and dealer in firearms, when first engaging in business and thereafter on or before the first day of July of each year, to pay a special (occupational) tax for each place conducting such business. The BATF will issue a tax stamp certificate to the operating unit.

2.8.6.2 Marking

Each licensed manufacturer or licensed importer of any firearm must legibly identify each firearm by engraving, casting, stamping (impressed), or otherwise conspicuously placing in a manner that will not be readily obliterated, altered, or removed, a number that does not duplicate any serial number placed by the manufacturer or importer on any other firearm.[126] BATF may authorize other means of identifying the article upon receipt of a letter application, in duplicate, from the licensed manufacturer or licensed importer showing that engraving, casting, or stamping (impressing) such a weapon is reasonable and will not hinder the effective administration of this requirement.

Each licensed manufacturer of explosive materials must legibly identify the articles by marking all explosive materials manufactured for sale or distribution. The markings required by this section must identify the manufacturer and the location, date, and shift of manufacture.[127]

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[126] ATF § 178.92.

[127] ATF § 55.109.

2.8.6.3 Serialization

The manufacturing unit shall uniquely mark and serialize destructive devices destined for commercial sale in order to:

- Distinguish them from those supplied to the Department of Defense.
- Conform with the program configuration and production control requirements.
- Conform with BATF requirements.

Licensees should allow two months' lead time on shipments to ensure that all internal compliance steps (*i.e.*, completion of ATF Forms 2 and 9) are completed in a timely manner.

2.8.7 Export Clearance

BATF regulations stipulate export clearance procedures.

2.8.7.1 U.S. Customs

When firearms are to be exported, two copies each of the permit and the Shipper's Export Declaration (SED), and the original DTC license must be submitted to the District Director of Customs at the port of exportation. This documentation must precede or accompany the shipment in order to permit appropriate inspection prior to shipment. Upon receipt of the approved ATF Form 9 Permit, provided in duplicate and authorizing the exportation of firearms, and the approved DTC export License, the District Director of Customs may order such inspection as deemed necessary prior to shipment of the hardware. If satisfied that the shipment is proper and the information contained in the Form 9 Permit and on the DSP-5 or DSP-85 License is in agreement with information shown on the SED, then the District Director of Customs will, after the hardware has been duly exported, execute the certificate of exportation, ATF Form 9, Part 3.

Customs will retain one copy of the ATF Form 9 with the SED and return the remaining copy to the exporter for return to BATF.

2.8.7.2 Proof of Exportation

The exporter must furnish proof of exportation to BATF within a six-month period following the date of issuance of the permit by BATF. This is the exporter's responsibility. Satisfactory evidence of exportation would be one of the following: (1) the certificate of exportation executed by a Customs official; (2) a certificate of landing executed by a Customs official of the foreign country to which the firearm is exported; or (3) a sworn statement of the foreign consignee covering the receipt of the firearm. The exporter must submit ATF Permit Form 9 in quadruplicate to BATF, together with serial numbers for the items required on ATF Form 9, block 4 f and a certified copy of a written order, contract of sale, or other evidence showing that the firearm was to be shipped to a foreign destination. The signature in item 10 must be entered in ink on all four copies. Photostatic, facsimile, or carbon copies are not acceptable.

Compliance with these requirements is facilitated by a tickler file to ensure that the executed certificate of exportation is forwarded to BATF within the allotted six-month period. The exporter must retain a copy of all executed ATF Form 9s. BATF returns three executed copies of ATF Form 9 and one copy of ATF Form 2 to the exporter.

2.8.7.3 Security Transportation Plan

Pursuant to the ITAR[128] and in accordance with the National Industrial Security Policy Operating Manual (NISPOM), a Security Transportation Plan (STP) is required for each contract that involves the international transfer of government classified material as freight. The STP describes arrangements for the secure shipment of the material from the point of origin to the ultimate destination. The U.S. Government and the recipient government and its Designated Government Representative (DGR) must be identified in the STP. The STP also must include contingency security arrangements in the event the transfer cannot be made promptly or within the planned procedures. When an STP is developed to support a program, project, or contract that will involve more than one international consignment of classified or sensitive material, a procedure is required to identify

[128] 22 C.F.R. § 126.6(c)(iii).

details for each consignment. A Notice of Classified Consignment must be provided to exporter personnel, the foreign government recipient, and other persons who will be involved in ensuring the security of the consignment.

2.8.7.4 Competent Authority Approval

A Competent Authority Approval (CAA) is issued by the U.S. Department of Transportation, Bureau of Explosives (BOE). The shipper, with the support of the BATF License Administrator, shall assure proper shipping papers are completed to enable the transport of explosives. CAA approval must accompany each overseas shipment and shall be referenced in the configuration management documents, integrated logistics support plans, and firearms technical orders. A CAA is issued per product designation (part number). When a subassembly of an explosive is shipped in place of the complete assembly and a different part number designation is applicable, a new CAA must be obtained from the BOE. Each CAA for explosives must contain the following information (which is provided by the Department of Transportation):

- United Nations (U.N.) proper shipping name and number.
- U.N. Classification Code.
- Reference Number (EX number).
- Product Designation/Part Number.

The BOE will send a laboratory report to the exporter's BATF License Administrator, who provides a copy to the requestor. The unit's BATF License Administrator forwards the laboratory report, with other pertinent documentation, to BATF. Following BATF's review, BOE issues the CAA. In addition to the CAA, the BOE may require a Performance Oriented Packaging (POP) test. The POP test demonstrates the ability of the container to protect the explosive while in transit.

2.8.8 Recordkeeping for Exports of Explosive Materials

A licensed importer, licensed manufacturer, or licensed dealer exporting explosive materials must maintain records showing the manufacture or acquisition of explosive materials; the quantity;

the manufacturer's name or brand name of explosive materials; the name and address of the foreign consignee of the explosive materials; and the date the explosive materials were exported. The exporter must request written approval from BATF to adopt electronic recordkeeping methods. Records must be maintained for six years.

2.8.9 BATF Compliance Inspections

BATF may perform annual compliance inspections to check records and to verify production and delivery data. Storage facilities are also subject to inspection. BATF coordinates its inspections with the appropriate Defense Contracts Administrative Services (DCAS) office.

2.8.10 Annotated BATF Forms

Upon receipt of a properly executed application for a license or license renewal on ATF Form 7, the BATF Chief, Firearms and Explosives Licensing Center, shall issue the appropriate license or license renewal. The license number may be assigned to the company unit as long as that unit maintains continuity of renewal in the same location (state).

ATF Form 7 supports the renewal of two types of licenses: (1) Type 10 which allows the manufacture of destructive devices; and (2) Type 11 which allows the importation of destructive devices.

License renewals are valid for three years. The exporter must send the application with the appropriate fee, either in the form of (1) cash, or (2) money order or check made payable to the Bureau of Alcohol, Tobacco and Firearms. The exporter must also send Copy 2 of Form 7 to the Chief Law Enforcement Officer (CLEO) of the locality in which the facility to be licensed is located, which must include a completed Form DD 258 (Fingerprint Identification Card) and photo for each responsible person. The Chief, BATF Firearms and Explosives Licensing Center, shall approve or deny an application for a license within the 60 day period beginning on the date the properly executed application was received.

The exporter must submit ATF Form 13/5400.16 when applying for an explosives license or permit under 18 U.S.C. § 40. Block 11 identifies the Type Codes, description, and fees for Explosives

Licenses and Explosives Permits. The company must identify the applicable Type Code by placing an "x" in the column on the same line as the Type Code. For instance, the following types might be identified:

• Type 23 License — Importer of High Explosives	$50 fee
• Type 30 License — Manufacturer of High Explosives	$5 fee
• Type 33 Permit — User of High Explosives	$20 fee

This license must be renewed every three years.

ATF Form 2 Notice of Firearms Manufactured or Imported is completed to identify the date of manufacture, model number, serial number, and other required information.

The exporter must submit ATF Form 9 Application and Permit for Permanent Exportation of Firearms to obtain a permit to permanently export the defense articles identified on Form 9. This should not be requested until an approved DSP-5 or DSP-85 export license is received from DTC, because Form 9 must reference the DTC export license number and approval date. Shipment can not be made until both the approved DTC license and BATF Form 9 Permit are received. The serial numbers of the listed defense articles on ATF Forms 2 and 9 must match.

ATF Form 5630.5R, Special Tax "Renewal" Registration and Return is used in connection with the requirement that every exporter that engages in the business of importing, manufacturing, or dealing in firearms in the U.S. pay a special (occupational) tax for each place where such business is conducted. The tax year begins July 1 and ends June 30. Special (occupational) taxes are due and payable on first engaging in business, and thereafter on or before the first day of July of each year. The payment of this tax constitutes application for registry as a taxpayer and results in the issue of a tax stamp certificate.

ATF Form 4483-A, Annual Firearms Manufacturing and Exportation Report only addresses firearms, such as pistols, revolvers, or rifles. Even a negative report must be submitted. The exporter may file this report with BATF via fax number 202 927-7488.

ATF Form 3, Application for Tax-Exempt Transfer of Firearms and Registration to Special (Occupational) Taxpayer is submitted in duplicate for the purpose of obtaining authorization to transfer a firearm within the United States to a commercial customer who holds

a Federal Firearms License and is a special (occupational) taxpayer (dealer to dealer). If approved, BATF shall return the original Form 3 to the transferor with the approval noted. BATF processing time for this form is about two to three weeks.

A company seeking to transfer a firearm within the U.S. without payment of a tax must complete a separate ATF Form 5, Application for Tax Exempt Transfer and Registration of a Firearm, for each firearm. If the transferor of a destructive device is a federal firearms licensee and the transferee is anyone other than a licensee qualified to deal in the firearm to be transferred, the transferee must sign the applicant certification in the presence of the Law Enforcement Officer signing item 3 of ATF Form 5.

The abbreviation BATF is used to identify the Government agency, whereas the abbreviation ATF is used to identify forms, licenses, permits, and regulations. Unless otherwise stated, all references are to the ATF regulations. BATF form numbers are subject to change.

TABLE 2-1
Sample Transmittal Letter for Registration Applicants

(It is recommended that the sample letter, signed by an authorized senior official, be on the intended registrant's letterhead. The suggested format will satisfy the requirements of 22 CFR § 122.2(b) when there is no conviction, indictment, or ineligibility to declare. If any such considerations apply, however, their full particulars must be provided.)

Mr. William J. Lowell
Director, Office of Defense Trade Controls (PM/DTC)
Department of State
2401 E Street, N.W.
Washington, D.C. 20037

Dear Mr. Lowell:

In compliance with 22 CFR § 122.2(b) (1) and (b) (2), I hereby state that I am an authorized senior officer of [insert the intended registrant's name]. Furthermore, I state that:

Neither the intended registrant, chief executive officer, president, vice-presidents, other senior officers or officials (e.g., comptroller, treasurer, general counsel) or any member of the board of directors

(i) has ever been indicted for or convicted of violating any of the U.S. criminal statutes enumerated in 22 CFR § 120.24; or
(ii) is ineligible to contract with, or to receive a license or other approval to import defense articles or defense services from, or to receive an export license or other approval from, any agency of the U.S. Government.

In accordance with CFR § 122.2 (b) 2, the applicant must also declare whether the intended registrant is owned or controlled by foreign persons (as defined in CFR § 122.2 (c)).

[Signature of Senior Officer
Full Name and Title]

TABLE 2-2
Notice Concerning Requests for Forms

United States Department of State
Washington, D.C. 20520

NOTICE

EFFECTIVE FEBRUARY 1989, REQUESTS FOR FORMS DSP-5, DSP-61, DSP-73, DSP-83, DSP-94 AND DSP-85 will be filled as follows. No phone requests are permitted:

In person. You may continue to pickup forms directly from OMC* by coming to the receptionist and making a request. Should you desire a large number, please call (202) 663-2700 for special arrangements. *Because all the forms will soon be replaced, you must provide special justification for large requests.* We recommend that companies with Washington representatives pickup and distribute forms through their representatives. This can expedite receipt by your division of the proper type and quantity of forms.

Mail requests. Requests by mail should be addressed to Department of State, Office of Munitions Control,* 2401 E Street, N.W., Washington, D.C. 20037 and include the number and type of forms required (with justification, if large quantities), your company PM/MC* code and a self addressed label.

FAX Requests: Requests by FAX should be sent to 703 875-6647 and include type of forms required, your company PM/MC* code and your address. *Please use the following format so we can use the bottom of the page as a mailing label.*

Sample FAX Request:

*TO: Office of Munitions Control**
FAX # 703-875-6647
FROM: PIE TECH INC., OMC Code 0011-2187
FAX # 212-555-1212
SUBJ: FORMS REQUEST

PIE TECH INC.
Mr. Jack Henry
1000 Underwater Way
Greenville, New York 158906

**Now Office of Defense Trade Controls (DTC) (PM/DTC)*
***Now Room 200*

TABLE 2-3
Decision Tree to Determine Required Action Under ITAR

1) Is proposed transaction in Table 2-1?
   ↓
   ↘ If yes, no ITAR license is required; but see Appendix. 2-1: 7 b,c

2) If no, is it an anti-personnel landmine?
   ↓
   ↘ If yes, sale or transfer is prohibited

3) If no, is to a currently proscribed destination listed in Section 2.3?
   ↓
   ↘ If yes, sale or transfer is prohibited

4) If no, is it to Canada and not in 2.3.1?
   ↓
   ↘ If yes, no ITAR license is required

5) If no, is it an exemption in 2.3.2?
   ↓
   ↘ If yes, no ITAR license is required

6) If no, is it SME and 126.8(a)(1-3)?
   ↓
   ↘ If yes, approval required before making a proposal and DSP-83 required with license application

7) If no, is it other SME or classified?
   ↓
   ↘ If yes, DSP-83 required with license application

8) If no, is it:
   a) A temporary import?
   b) A temporary export?
   c) A defense service beyond furnishing technical data?
   d) To a distributor?
   ↓
   ↘ If yes, submit:
   a) DSP-61
   b) DSP-73

TABLE 2-3 (CONTINUED)

	c) Request for approval of manufacturing license agreement or technical assistance agreement d) Request for approval of an agreement for warehousing and distribution
9) If no, is it part of an FMS transaction?	If yes, obtain a DSP-94
10) If no, submit a DSP-5	

APPENDIX 2-1 Anomalies in the International Traffic in Arms Regulations

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INTRODUCTION

A complete ITAR revision became effective July 22, 1993. This analysis is based on that revision, as amended on June 10, August 17, September 2, September 9, and September 19, 1994; February 16, May 3, June 27, July 27, July 12, August 9, August 12, September 17, November 5, and December 30, 1996; May 20, July 11, and December 24, 1997; April 9, 1998; and March 15 and April 12, 1999. In early 1989, the Department of State requested a broad-based industry group for recommendations on how to respond to more than 175 proposals to revise ITAR which it had received from numerous government and industry sources in 1987 and 1988. In November 1990, the industry Ad Hoc Committee for ITAR Revision responded with a proposed complete rewrite of ITAR. This contained substantive suggestions from many industry sources. These proposals were not limited to liberalization. Indeed, there were as many strengthening as liberalizing recommendations. The author of this book was the principal source of many detailed drafting changes to make the entire report coherent, logical, and unambiguous.

In early 1992, government officials sequestered themselves for a week or two, without industry participation, to prepare their own proposal, which would take into consideration the industry response. This "Camp ITAR" process resulted in the publication, in the *Federal Register* on May 7, 1992, of a proposed rule. The proposal incorporated several of the Ad Hoc Committee recommendations but omitted many of them. On May 20, 1992, the author responded to the State Department's invitation to comment on this proposal. This comment took the form of a detailed comparison of the proposed rule with both the then existing text and the Ad Hoc Committee's recommendations, followed by an analysis of perceived deficiencies in the proposal and recommendations to remedy those deficiencies. The final rule made few changes from the proposed rule.

The analyses in this Appendix are drawn largely from the author's May 20, 1992, comments. However, unlike those comments, the analyses here are not followed by recommended changes in the ITAR text. The Appendix at the end of Chapter 1 includes recommended revisions to remedy anomalies in items on the U.S. Munitions List and the Commerce Control List and in the criteria for determining which agency has jurisdiction. This is

because there is some prospect that such changes might be made in the near future. The Congress might revive in 1999 a legislative initiative, first attempted in 1990, to add to the Export Administration Act criteria to clarify the respective jurisdictions of Commerce and State. However, there is virtually no prospect that the anomalies in other parts of ITAR noted in this Appendix will be remedied in the foreseeable future. Therefore, exporters will have to learn to live with them for a long time.

1. Eligibility to Be Granted or to Apply for a License or Other Approval

a. A foreign government entity in the United States could be granted a license (120.1 (c) first sentence) but applications for licenses will be considered only if the applicant has registered (120.1 (c) penultimate sentence) and only persons engaged in the United States in manufacturing or exporting defense articles or furnishing defense services are required to register (122.1 (a)).

b. The requirement that only U.S. persons and foreign governmental entities in the United States may be granted approvals does not apply to retransfer approvals (120.1 (c) first sentence) but foreign persons other than governments are not eligible (120.1 (c) second sentence) and 126.13(a)(4) seems to limit eligibility to apply for any approval to U.S. persons.

c. Foreign persons may be granted retransfer approvals (120.1(c) first sentence) but applications for approvals will be considered only if the applicant has registered (120.1(c) penultimate sentence).

d. Applications for licenses or other approvals will be considered only if the applicant has registered (120.1(c) penultimate sentence) but registration is only "generally" a precondition to the issuance of any license or other approval (122.1(c) last sentence).

2. Policy on Designating USML Items

a. An article may be added to the USML in the future only if it is specifically designed, developed, configured, adapted, or modified for a military application (120.3 and 120.6 second

sentence); but the following items presently on the USML are not so limited:

- — II(c), IV(h), VI(f), VII(h,e), VIII(e,g,h), IX(b), X(d), XI(c), XII(e), XIV(e), XV(e), XX(c) accessories, attachments, and associated equipment;
- — IV(d) space launch vehicle power plants;
- — VIII(f) developmental aircraft, engines, and components developed principally with U.S. Department of Defense funding;*
- — XI(b) electronic equipment for intelligence or security purposes;
- — XII(d) guidance, control and stabilization systems;
- — XII(d) astrocompasses and star trackers;
- — XIII(c) self-contained diving and underwater breathing apparatus;
- — XIII(d) carbon/carbon billets and preforms;
- — XIII(i) metal embrittling agents;
- — XIV(a-c) chemical and biological agents and equipment for their dissemination, detection, and identification;
- — XV communication satellites;
- — XV(d) global positioning system receivers with specified technical characteristics.

b. Two negative conditions linked by "and" are invariably ambiguous. The two conditions for the 120.3(a) policy for adding articles to the USML are:

(i) Does not have predominant civil applications, and

(ii) Does not have performance equivalent (to an item) for civil applications.

This could be interpreted to mean that, to be excepted under (a), an item must have not only performance equivalent to a civil item but also predominant civil applications. But it could also be interpreted to mean that an item would be excepted if it had equivalent performance and did not

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* Category VIII(f) excludes "such aircraft, engines, and components subject to the jurisdiction of the Department of Commerce. However, neither State nor Commerce regulations specify which developmental aircraft, engines, and components are subject to Commerce jurisdiction.

have predominant civil applications. The latter is logically intended but is grammatically unclear.

c. The double negative debate re 120.3(a) may never arise, because 120.3(b) provides a basis for adding an item to the USML regardless of predominant civil applications or performance equivalence to an item for civil applications.

d. COCOM Industrial List items shall not be on the USML unless omission from the USML would jeopardize significant national security or foreign policy interests (120.4(d)(3)(iii)). But COCOM criteria applicable to the Industrial List called for restricting only those items which would make a significant contribution to the military potential of proscribed destinations and thus have an adverse effect on the security of the member states. EAA section 6 authorized Commerce to control exports for foreign policy purposes. There are many COCOM Industrial List items which are now on the USML. There are many items now on the USML which were not on either the COCOM Industrial List or the COCOM Munitions List. COCOM was disbanded in 1994 and has been succeeded by the Wassenaar arrangement.

3. Commodity Jurisdiction

a. The Department of State shall make determinations whether an item meets USML criteria; State, Defense, and Commerce will resolve commodity jurisdiction disputes; and State shall notify Defense and Commerce of the initiation and conclusion of each case (120.4). However, unless Commerce changes its controls to be consistent with each State change, either overlapping jurisdiction or gaps will result from State simply notifying Commerce (rather than the two agencies jointly notifying the public after coordination).

b. Export of an article or service on the U.S. Munitions List is regulated by the Department of State, except as indicated otherwise in this subchapter (120.5 first sentence). But there is no indication in this subchapter of Treasury controls on exports of USML-listed items from foreign countries by persons subject to U.S. jurisdiction (see section 1.2.1.1

above). Moreover, there are many items on both the U.S. Munitions List and the Commerce Control List (see section 1.2.1.5.3 and Appendices 1-1, 1-2, and 1-3 above).

c. For the relationship of this subchapter to regulations of the Department of Commerce, the Department of Energy and the Nuclear Regulatory Commission, see 123.20 (120.5 second sentence). There is another applicable reference, namely, 125.1(e). Neither 123.20 nor 125.1(e) mention the Department of Commerce, although they do mention Category XVI and Category XVI refers to 123.21 (instead of to 123.20) and to Department of Commerce Export Regulations. The Category XVI reference to Commerce does not help to resolve instances of State-Commerce concurrent jurisdiction for dual-use items on Commerce's nuclear referral list, which Commerce is obliged to control pursuant to section 309(c) of the Nuclear Non-Proliferation Act 1978 amendments to the Atomic Energy Act.

4. Export of Technical Data

a. The AECA authorizes the President to control the export of only defense articles and defense services (22 USC 2778(a)(1)); "defense article" is defined to include technical data (120.6); and "defense service" is defined to include furnishing technical data to foreign persons (120.9(a)(2)). But 126.1(e) imposes a restriction on defense articles, defense services or technical data.

b. The definition of "defense service" is furnishing to a foreign person assistance or technical data (120.9(a)(1,2)); an approval is required for furnishing assistance (124.1(a)) whereas a license is required for the oral, visual or documentary disclosure of technical data regardless of the manner in which the technical data is transmitted (125.2(c)). It is unclear how any "assistance" could be furnished, requiring a 124.1(a) approval, which would not also involve an export of technical data, requiring a 125.2(c) license. The only example given for "assistance" is training. Any training would include at least oral disclosure of information. Any other type of assistance would include at least visual disclosure of the results of such assistance.

c. The definition of "defense article" includes technical data recorded or stored in any physical form (120.6); a license is required for the export of a defense article (123.1(a)); and a license is required for the oral, visual or documentary disclosure of technical data regardless of the manner in which the technical data is transmitted (125.2(c)). The 120.6 definition might be interpreted to limit technical data controls to tangible transfers; whereas the 125.2(c) license requirement applies to intangible transfers. The intent of "in any physical form" in 120.5 might be to differentiate transfers requiring a license from assistance requiring a 124.1(a) approval. However, the 125.2(c) license requirement seems to include more than transfers recorded or stored in any physical form.

d. The AECA refers to persons of the United States involved in export and import (22 USC 2778(a)(1)); the U.S. person, in order to obtain the required approval for furnishing assistance to a foreign person, must submit a proposed agreement (124.1(a)); and approval must be obtained for the export of technical data by a U.S. person to a foreign person unless the proposed export is exempt (125.3(c)). However, neither the definition of "defense services" in 120.9(a) nor the definition of "export" in 120.17 specifies applicability only to U.S. persons.

e. The definition of "export" includes transferring, while abroad, technical data to a foreign person (120.17(4)). The comparable Commerce definition is release of technical data of U.S.-origin in a foreign country (15 CFR 734.2(b)(4.5)). The ITAR definition would seem to prohibit innocuous transactions, such as a U.S. person handing foreign-origin data from one foreign person to another foreign person.

5. Significant Military Equipment

a. Significant military equipment (SME) includes items in 121.1 preceded by an asterisk (120.7(b)(1)); but the asterisk means that the article is deemed to be "significant military equipment" only to the extent specified in 120.19 (121.1(b)

second sentence; the July 22, 1993, revision changed the number of 120.19 to 120.7).

b. The old 120.19(b) provided that only portions of some asterisked items were SME, e.g., I(a), I(b), and V(a) only in quantity; III(a) excluding ammunition for firearms in I; and VI(b) only turrets and gun mounts, missile systems, and special weapons systems. These provisions have been dropped but the reference to them remains in 121.1(b).

c. 120.7(b)(2) defines SME to include all classified articles enumerated in 121.1 and 120.6 defines "defense article" to include technical data. But 123.10(a) refers to SME and classified articles and 124.10 refers to SME, (or) classified articles or classified technical data.

6. Software

a. It is unclear whether "directly related to defense articles," which qualifies the software portion of the definition of technical data in 120.10(4), is intended to be broader or narrower than "required for the design development, production, manufacture, assembly, operation, repair, testing, maintenance or modification of defense articles," which defines the information other than software portion of that definition in 120.10(1)

b. Software is defined in 121.8(f) as including but not limited to various functions. Such an unlimited definition does not help an exporter determine whether his product, which is not described in the list of functions, is nevertheless "software" as that term is used in ITAR.

c. The list of functions in 121.8(f) includes operating systems. Such systems are for internal computer operation and are not directly related to the use of the computer for a defense article.

d. A person who intends to export software only should, unless it is specifically enumerated in 121.1 (*e.g.*, XIII(b)), apply for a technical data license pursuant to part 125 of this subchapter (121.8(f) second sentence). However, in 121.1, each of the Categories on the USML includes:

> Technical data (as defined in 120.21 of this subchapter) directly related to the defense articles enumerated in this category.

The technical data definition in 120.10 (not 120.21) includes software. The same forms are used for both commodity and technical data license applications (DSP-5 for unclassified and DSP-85 for classified). There is, thus, no apparent procedural distinction between XIII(b) software and any other software.

7. Public Domain

a. "Public domain" means information which is published and which is generally accessible or available to the public through various means (120.11 first sentence). But one of those means is through fundamental research, where the information is "ordinarily published" (120.11(8)). Moreover, 125.1(a) second sentence includes as a citation for public domain 125.4(b)(13), which is an exemption for technical data approved for public release which "does not require that the information be published in order to qualify for the exemption."

b. Information which is in the public domain is not subject to the controls of this subchapter (125.1(a)); but the following subject public domain information to control:
   - Before technical assistance may be furnished, approval is required even if "all the information relied upon by the U.S. person in performing the defense service is in the public domain" (124.1(a));
   - The exemptions under 125.4 may not be used to establish offshore procurement arrangements (124.13(e) and 125.4(a) third sentence);
   - The exemptions in 125.4 may not be used for foreign production purposes or for technical assistance without approval (125.1(b)).

c. There is no apparent distinction between the process of furnishing assistance and the process of transferring technical data (see 4.b. above). All of the types of information in the definition of "technical data," *i.e.,* design, development, production, manufacture, assembly, operation, repair, testing, maintenance, or modification (120.10(1)) are included in the "assistance" portion of the definition of "defense service" (120.9(a)(1)). Therefore,

any disclosure of information in the public domain which is exempt from technical data control appears to be recontrolled as assistance.

8. United States

a. The definition of "United States" in 120.13 omits the provision in 123.6 that foreign trade zones and U.S. Customs bonded warehouses are considered integral parts of the United States.
b. An export license is not required for the shipment of defense articles between the United States, the Commonwealth of Puerto Rico, and U.S. possessions (123.12). However, the definition of "United States" in 120.13 includes, in addition to Puerto Rico and possessions, any territory of the United States and any territory over which the United States exercises any powers of administration, legislation, and jurisdiction.

9. U.S. Person and Foreign Person

a. 120.15 defines a U.S. person, in part, as a protected individual as defined by 8 USC 1324b(a)(3), whereas 126.13(a)(4) appears to use a different definition, namely, a U.S. citizen or national or a person admitted for permanent residence under the Immigration and Nationality Act (8 USC 1101(a), section 101(a)20).
b. "U.S. person" includes an entity incorporated to do business in the United States (120.15); and "foreign person" includes an entity not incorporated or organized to do business in the United States (120.16). Thus, an entity in the United States which is organized for some purpose other than to do business, e.g., a non-profit organization, would apparently be a foreign person; and an entity which is organized, but not incorporated, to do business in the United States would apparently be neither a U.S. person nor a foreign person.
c. The transmittal letter for a Statement of Registration must state whether the entity is owned or controlled by foreign persons and, if so, whether it is incorporated or otherwise authorized to engage in business in the United States

(122.2(b)(2)). This suggests that such an entity would be a U.S. person even if otherwise authorized, rather than incorporated, to do business in the United States.

d. A registrant must, in advance of an intended transfer to a foreign person of ownership or control of that registrant, provide information to determine whether authority should be invoked to require a license or other approval to transfer an item on the USML to the control or possession of a foreign person (122.4(b), which cites 22 USC 2778(g)(6) and refers to 120.10). However, 120.17 (the new number replacing 120.10), coupled with 123.1, appears to require this even without a special invocation of 2778(g)(6). For example, the transfer of a controlled item from a subsidiary in the United States to its foreign parent requires a license.

10. Reexport and Retransfer

a. "Reexport or retransfer" is broadly defined in 120.19; and the second sentence of 123.9(a) requires written approval for reselling, transferring, transshipping, or disposing of a defense article to any end user, end use or destination other than as stated on the export license. However, the relevant AECA authority is to control the "export" of defense articles (22 USC 2778(a)(1)) and the 120.17 definition of "export" does not include reexport or retransfer.

b. 123.9(a) requires approval for transshipping, whereas 123.9(d) requires approval for transshipping only on a non-continuous voyage.

c. The 123.9(a) approval requirement would apparently apply even to:
   - — transactions which, if exported directly from the United States, would not require a license;
   - — a retransfer from a foreign embassy in the United States to its home country after a licensed transfer to that embassy per 120.17(3); or
   - — retransfers from a foreign person to a U.S. person.

d. 123.1(c)(5), 123.10(a), and 124.10 state that Form DSP-83 is required for significant military equipment. But these provisions omit any reference to 123.15, which requires a

DSP-83 for a contract of $50,000,000 or more for items which are not significant military equipment.

e. DSP-83 provides that the applicant merely certifies that foreign certifications have not been altered. Therefore, the following are misleading by stating that the applicant "executes" this form or by implying that the applicant signs it before the foreign consignee and end-user have signed:
   — 123.10(a) states that the DSP-83 is to be executed by the foreign consignee, foreign end-user, and the applicant;
   — 123.15 states that the DSP-83 is to be signed by the applicant, the foreign consignee and end-user.
   — 124.10 states that the DSP-83 is to be signed by the applicant and the foreign party;
   — 125.3(a) states that the DSP-83 is to be executed by the applicant, foreign consignee, and end-user.

f. 123.10(a) refers to SME enumerated in the application, whereas the DSP-83 refers to articles/data listed in item 5 of that form.

g. 123.10(a) refers to the country named as the location of the foreign end-use, whereas the DSP-83 refers to the named country of ultimate destination.

h. 125.3(a), states that execution by an authorized representative of the foreign government involved will be required for classified items. However, 125.7, which also concerns classified items, refers to 123.10 and 123.10(c) states that when a DSP-83 is required for an export to a non-governmental foreign end-user, ODTC may require that a governmental authority also execute the certificate.

i. 123.14(b) second sentence states that ODTC may require an exporter to submit with a license application an Import Certificate provided by the government of the importing country. But 123.14(b) last sentence states that the Import Certificate must be furnished to the U.S. exporter by the foreign importer.

j. 124.10 states that ODTC may require as a condition for approval of a manufacturing license agreement or a technical assistance agreement that the foreign party's government provide undertakings comparable to those contained in the Form DSP-83 (*e.g.*, in a diplomatic note).

But foreign governments would be more likely to provide either an International Import Certificate or a national variation thereof, *e.g.*, a Chinese, Indian, Polish, Hungarian, Czech, Slovak, Bulgarian, or Romanian Import Certificate.

11. Temporary Import

a. The 120.18 definition of "temporary import" contains no definition of "temporary"; whereas 123.4(a) limits five exemptions from the temporary import license requirement to imports for a period up to 4 years.
b. 123.21(a) states that a license is valid for four years. Since shipment cannot take place until some time after issuance of the license, this would limit the permissible time between import and subsequent export to a period of less than four years.
c. 123.3 requires a license for temporary imports unless exempted from this requirement by 123.4. However, there are other exemptions explicitly applicable to temporary imports:
   — 123.17(d) firearms and ammunition brought into the United States by a foreign person;
   — 125.4(b)(7) technical data being returned to the original source of import;
   — 126.4(a,c) for U.S. Government (USG);
   — 126.5(a) for end-use in Canada;
   — 126.6(b) foreign military aircraft and naval vessels and the following export license exemptions might reasonably apply to exports after temporary import: 123.16(b)(1,3,4), 123.17(a,b), 125.4(b)(1-6,8,11,13), and 126.6(a,c).
d. 123.4(c)(1) states that, to use a 123.4(a) exemption, the importer must meet 120.1(b) eligibility requirements. 120.1(c) (which is the correct cross-reference) would prevent a foreign person, other than a foreign governmental entity, from using the 123.4(a)(3) exemption for marketing in the United States. This may be the intention; but some readers might assume that 123.4(a)(3) was designed to permit foreign marketing.

e. To use a 123.4(a) or (b) exemption, the ultimate consignee must be the same as the foreign consignee or end-user of record named at the time of import (123.4(c)(2)). However, at the time of import, the consignee is the U.S. importer. The 123.4(a)(5) exemption for imports approved under the U.S. Foreign Military Sales program might involve cases where the U.S. Government would prefer export to another consignee. The 123.4(b) exemption applies only to the import and permits export to a third party subject to approval of an export license application.

12. Forms

a. The 120.28(a) list of forms available from the Department of State omits a new amendment application form DSP-119.
b. 123.25(a) states that a suggested format is available for license amendments without referring to the new Form DSP-119.

13. Missile Technology Control Regime

a. 120.29(c) refers to:
   — AECA section 71(a) (22 USC 2797) as establishing, as part of the USML, a list of MTCR items not controlled under EAA section 6(1); and
   — 121.16 as constituting this list.

   However, many of the State-Commerce concurrent jurisdiction items identified in section 1.2.1.5.3 above are MTCR items.
b. 121.16 recognizes that some MTCR items are controlled by both Commerce and State and then asserts that, to the extent an article is on the USML, a reference appears listing the USML category in which it appears. However, there is no recognition in 121.16 that the USML MTCR items are not to include MTCR items controlled under the EAA (similar to the 123.20 and 125.1(e) deferrals to DOE and NRC for nuclear items).
c. The 121.16 list does not include amendments to the MTCR list.

14. Registration

a. Use of the word "intended" to modify "registrant" in 122.2(a) implies incorrectly that something more than transmittal of a Registration Statement, submission of required documentation, and payment of a fee is necessary. The Statement is not an application requiring government approval.
b. The new entity formed when a registrant merges with, acquires, or is acquired by another company shall advise the new firm name and all previous firm names being disclosed (122.4(c)(1)). It is probable that "discontinued" was intended rather than "disclosed."
c. 22 CFR 122.1, headed "Registration requirements" contains no mention of, nor reference to, the 129.3 requirement that any person located in the United States or otherwise subject to U.S. jurisdiction who engages in brokering activities must register.

15. License Requirements

a. 123.1(c) lists six documents which may be required as a condition to the issuance of a license or other approval. This is not a complete list. 126.13 lists additional required information.

16. Permanent Imports

a. Permanent imports are regulated by Treasury (123.2); but State regulates temporary exports (123.5), which involve permanent imports subsequent to the export. As one example, 123.16(b)(9)(ii) requires State approval for the sale or transfer of parts exported under a temporary export license exemption for processing by a foreign subsidiary. Such sale or transfer would be a permanent import into the United States.
b. 123.4(a)(4) exempts from the temporary import license requirement articles rejected for permanent import by Treasury; but 123.4(c) specifies that, to use a 123.4(a) exemption, the importer must meet 120.1(b) eligibility requirements, the ultimate consignee must be the same

as the foreign consignee at the time of import, and the temporary import must not be from a country proscribed by 126.1 unless a 126.3 exception has been granted. In other words, State is apparently applying its regulations to cases for which Treasury is denying applications for permanent import. The U.S. person eligibility requirement of 120.1(c) (which should have been referenced instead of 120.1(b)) would be illogical if Treasury was rejecting permanent import because there was no U.S. person importer.

c. 123.4(a) limits the five temporary import license exemptions which follow, including 123.4(a)(4), to U.S.-origin defense articles (including any article manufactured abroad pursuant to U.S. Government approval). A Treasury rejection for permanent import would be more likely for a non-U.S.-origin item.

d. 123.6 states that an export license is required for "all" shipments from foreign trade zones and U.S. Customs bonded warehouses to foreign countries. This appears to override the 123.4(a) temporary import license exemptions.

17. Temporary Exports

a. A temporary export license is valid only if the article will be exported for a period of less than 4 years (123.5(a) second sentence). A renewal of a temporary export license must be obtained if the article is to remain outside the United States beyond the period for which the license is valid (123.5(a) fourth sentence). Licenses must be renewed upon their expiration if offshore procurement is to extend beyond the period of validity of the license (124.13). But 123.21 states that defense articles to be shipped after the four-year validity of a license require a new application and license and 123.25(c) states that amendments to extend duration will not be approved. It is unclear whether a renewal could be obtained at all and, if so, whether it could permit export for a period of 4 years or longer.

b. 123.21 states that a license is valid for four years. Since export cannot take place until some time after the license is issued, the time between export and subsequent import would have to be less than four years.

c. Transfer of title will not occur during the period of temporary export, whether licensed (123.5(a) second sentence) or eligible for the exemption for parts processed by subsidiaries (123.16(b)(9)(ii)). Accordingly, articles exported pursuant to a temporary export license may not be permanently transferred to a foreign person while they are overseas (123.5(a) third sentence). This leaves in doubt whether transfer to another U.S. person would be permissible.

d. 123.1(a) requires a license to export a defense article unless the export qualifies for an exemption; and 123.1(a)(2) states that applications for licenses for temporary export must be made on Form DSP-73. The following exemptions apply explicitly to temporary exports:
   - 123.11(b) vessel or aircraft departing the United States and not entering the territorial waters or airspace of a foreign country and not carrying any defense article;
   - 123.13 domestic aircraft via a foreign country;
   - 123.16(b)(5) for exhibition if a previous license for exhibition is still valid;
   - 123.16(b)(9) parts to be processed by a subsidiary;
   - 123.17(c) firearms and ammunition by U.S. person;
   - 123.17(e) ammunition for firearms referred to in (a) (reference should be to (c));
   - 123.18(a)(2,3) & (b) firearms and ammunition for USG employees;
   - 125.4(b)(9) technical data to a U.S. employee of a U.S. corporation;
   - 126.4(a,c) for USG.

   It is not clear whether the following export license exemptions are intended to apply also to temporary exports: 123.16(b)(1,2,3,4), 123.17(a,b), 123.18(a)(1), 125.4(b)(1-6, 8,11,13), 126.5(a), 126.6(a,c).

e. 123.17(b) states that customs "shall permit" export without a license of nonautomatic firearms manufactured in or before 1898. However, to comply with the Wassenaar Munitions List, the United States should control some such firearms manufactured between 1890 and 1898.

f. The 123.17(c,e) exemptions for the export of firearms and ammunition by U.S. persons are not applicable to personnel

"referred" to in 123.18, which exempts export of firearms and ammunition by U.S. Government employees if they are assigned abroad for extended duty. The 123.18 exemptions do not apply to dependents. It is unclear whether 123.17 exemptions apply to U.S. Government employees on non-duty travel; to U.S. Government employees on duty travel which is not extended; or to dependents of U.S. Government employees.

g. Cartridges exempted by 123.17(c,e) are for the exclusive use of the U.S. person exporter and ownership may not be transferred; whereas the 123.18(b) cartridge exemption is not similarly conditioned. This gives the appearance of permitting U.S. Government employees to permit others to use the cartridges and to transfer ownership. However, where an exemption is claimed, 123.9 prohibits any end-user or end-use other than that stated on the Shipper's Export Declaration.

18. Foreign Trade Zones

a. The first sentence of 123.6 states that foreign trade zones and U.S. Customs bonded warehouses are considered integral parts of the United States; but the second sentence states that an export license is not required for shipment between the "United States" and a foreign trade zone or a Customs bonded warehouse.

b. 123.6 states that an export license is required for "all" shipments from foreign trade zones and U.S. Customs bonded warehouses to foreign countries. This appears to over-ride other exemptions, such as those for Canadian and Mexican border shipments (123.19), exports to Canada (126.5), and many others. Also note that this requirement differs from the Commerce regulation permitting exports from bonded warehouses without a license under specified circumstances (15 CFR 740.9(b) Note 1 and 740.9(b)(1)).

c. 123.6 is silent as to whether a temporary import license is needed for entry into a foreign trade zone or a Customs bonded warehouse. This is presumably the case, since these areas are considered integral parts of the United States. In

that event, the temporary import license would normally also authorize the subsequent export.

19. Exports to Warehouses

a. 123.7 requires a license for export to a warehouse or distribution point outside the United States for subsequent resale unless the exemption under 123.16(b)(1) is used. 124.14 states the same requirement. It is unclear whether it is intended that no other exemption apply to exports to a warehouse, such as 123.16(b)(2,3,4), 126.4, 126.5, 126.6.

b. 123.7 states that such a license will normally be granted only if an agreement has been approved pursuant to 124.14. 123.1(a) requires a license to export unless the export qualifies for an exemption and 123.9(a) requires an approval for resale. The only purpose served by 123.7 not served more clearly by 123.1(a) and 123.9(a) is to indicate that, even in the absence of a 124.14 agreement, in abnormal circumstances a license might be granted to export to a distribution point when end-users are not known.

c. Two approvals, one for the warehouse agreement and one for the subsequent resale should not be necessary if the resale customers are known at the time of export from the United States.

20. Congressional Notification

a. 123.15 requires persons to notify ODTC of intended exports pursuant to an exemption (*e.g.*, for exports to Canada per 126.5) under circumstances for which Congressional notification is required. Another directly relevant exemption is 123.16(b)(1), in furtherance of an approved manufacturing license agreement or technical assistance agreement.

b. 124.11 states that ODTC will not approve agreements requiring Congressional notification pursuant to 22 USC 2776(c)(1) and (d) until 30 calendar days have elapsed since receipt by the Congress of the required certification without the Congress having enacted a joint resolution

prohibiting the agreement. However, although the 30 day waiting period described is required under 22 USC 2776(c), it is not required under 22 USC 2776(d).

21. Export License Exemptions

a. 123.16(b) describes various export license exemptions and refers to others which are described in 123.17, 123.18, and 126.5. However, this list omits still other exemptions described in 123.4, 123.5, 124.3, 125.1(a), 125.4(b)(1-13), 126.4, and 126.6.

b. Reserved

c. 123.16(b)(2) refers to 123.17 for exemptions for firearms and ammunition. Conditions in 123.16(b)(2)(iv,v) are not splitting orders and not making more than 24 shipments per calender (sic) year would logically also apply to 123.17(a).

d. 123.16(b)(4) disqualifies components covered by the USML from the exemption for models or mock-ups, referring to 120.6(b). There is no 120.6(b). The 1992 proposal for a part (b) in the definition of "defense article" to cover components was dropped in the 1993 final rule. Although models and mock-ups are not mentioned explicitly in the USML, the 120.6 definition of "defense article" includes models and mock-ups. As a result, one must assume that all USML categories include models and mock-ups and their components, unless exempted. There is no exemption for components of even inoperable models and mock-ups.

22. Duration of Permanent Export Licenses

a. 125.7 states that only one copy of the data or descriptive literature must be provided if a "renewal" of the license (for the export of classified defense articles) is requested. But 123.21 states that defense articles to be shipped after the four-year validity of a license require a new application and license and 123.25(c) states that amendments to extend duration will not be approved. It is unclear whether a renewal could be obtained at all and, if so, whether

it could permit export for a period of four years or longer.

b. 123.21 and 125.8(b) provide that the license expires when the total value authorized has been shipped. However, 123.23 permits the total value to exceed the amount stated on the license by up to 10%.

23. Shipper's Export Declaration (SED)

a. 123.22(c) states that, except for the export of unclassified technical data, an exporter must file a SED and 123.24 states that a SED must be authenticated before an article is actually sent abroad by mail. However, Bureau of Census regulations exempt from the SED requirement not only unclassified technical data but also the following:
   - — either the shipper or the addressee is not a business concern;
   - — by mail valued under $500;
   - — to free world countries valued less than $2,500;
   - — by mail not exported for commercial consideration;
   - — from one point in the United States to another through Canada or Mexico;
   - — from one point in Canada or Mexico to another through the United States;
   - — to U.S. Armed Forces;
   - — business records from a U.S. firm to its subsidiary.

24. Monetary Value Shipping Tolerance

a. The heading of 123.23 is "monetary value of shipments"; but that section provides no guidance on how to figure monetary value.

b. 123.23 allows a shipping tolerance of up to 10% of "aggregate monetary value" stated on the license. But license forms use the term "total value."

c. 123.23 permits shipment on "any" license when the total value of "export" does not exceed the 10% tolerance. It is unclear whether the same tolerance is permissible for a temporary import before a subsequent export and for permanent import after a temporary export.

25. Furnishing Assistance

a. The 124.1(a) requirement for approval for furnishing assistance to foreign persons (120.9(a); the correct cross-reference is 120.9(a)(1)) makes no mention of exemptions. But 124.2 provides for exemptions.
b. 124.2 exemptions do not include the following, which would be logical: 125.4(b)(1,3,9,10,11,12).
c. 124.2(a) refers to training in operation and maintenance; whereas 125.4(b)(5) refers to operation, maintenance, and training.
d. The 124.12(b)(4) statement on sub-licensing belongs more logically in the 124.8 clauses required in both manufacturing license agreements and technical assistance agreements rather than in a letter of transmittal.
e. 125.1(b) states that approval is required to use a license for the export of technical data for foreign production purposes and such approval is generally provided only pursuant to 124 procedures. 124.13 introduces provisions on offshore procurement with "Notwithstanding the other provisions in part 124." It would be clearer to state the apparent objective of the notwithstanding clause, namely, that neither a manufacturing license agreement nor a technical assistance agreement is required if a DSP-5 is approved.

26. Import of Technical Data and Classified Articles

a. Import is not mentioned in 125 heading, 125.1, 125.2, 125.3(a,c), or 125.4(a) first sentence. The 125.3(b) reference to procedures for classified technical data approved for reexport after a temporary import is silent as to whether the import required approval. However, 123.1 requires approval for temporary imports and 123.1(a)(4) specifies that applications for the temporary import of classified defense articles or classified technical data must be made on Form DSP-85.
b. 125.4(b)(7) exempts technical data being returned to the original source of import and 125.4(b)(9) implies an exemption for import after a temporary export to a U.S. person employed overseas. It would be logical also to exempt the following technical data for both temporary

imports and temporary exports: 125.1(a) public domain and 125.4(b)(1-6, 8, 11, 13).

c. One can deduce that there is no requirement for a license for the temporary import of unclassified technical data. But such a deduction may or may not correspond with the Government's intent.

27. Classified Exports

a. 125.3(a) requires submitting a request to ODTC for approval to export defense articles classified by a foreign government. 125.7 requires all applications to export classified defense articles must be submitted on a DSP-85. Since 125.7 does not mention articles classified by a foreign government, it is unclear whether the request for approval in such a case should be on a DSP-85.

b. 125.3(a) states that a request for approval must list the facility security clearance code of all U.S. parties on the license and include the Defense Investigative Service cognizant security office of the party responsible for packaging the commodity for shipment. 125.7 requires that classified materials accompanying an application must be transmitted in accordance with the Defense Industrial Security Manual. It would be clearer to put all security requirements in one place.

28. Technical Data Exemptions

a. 125.4(a) provides that 125.4(b) exemptions, except for (b)(13), do not apply to exports to proscribed destinations under 126.1. It is illogical to invalidate the following 125.4(b) exemptions even for proscribed countries:

(1) DOD request;
(3) USG contract;
(4) copies of previously authorized data to same recipient;
(5) basic O&M for authorized defense article;
(7) return to source of import;
(11) required by DOD, DOE, or NASA;
(12) by or for USG agency, FMS.

b. 125.4(b)(3) excludes from the USG contract exemption data disclosing details of design, development, production, or manufacture of any defense article. However, the contract, itself, could require disclosing such data.
c. 125.4(b)(10)(iii) conditions the exemption on disclosure in the U.S. by U.S. institutions of higher learning to foreign person employees by requiring approval for the transfer to other foreign persons. If an institution has more than one foreign person employee, it is illogical to prevent them from communicating with each other.
d. 125.4(b)(11) exempts data for which export is required by DOD, DOE, or NASA provided ODTC has granted an exemption in writing. The distinction between issuing a license and granting an exemption in writing is obscure.

29. Plant Visits

a. 125.5(a) provides that a license is not required for the disclosure of unclassified technical data during the course of a classified plant visit subject to various conditions, including meeting the requirements of the Defense Industrial Security Manual in the case of visits involving classified information. But disclosure of unclassified technical data does not involve classified information.
b. 125.5(c) provides that a license is not required for the disclosure to a foreign person of unclassified technical data not in excess of that approved for disclosure and not usable for design, development, production or manufacture of a defense article. The "not usable" condition nullifies the approved for disclosure license exemption to the extent that data usable for design, development, production or manufacture of a defense article was approved for disclosure.

30. Certification for Exemptions

a. 125.6(a) refers to claiming an exemption under 125.4 and 125.5. But an exemption could be claimed under either one.
b. 125.6(a) requires that, for 125.4, certification consist of marking the package or letter containing the technical data.

But, if the disclosure were oral or visual, there would be no package or letter.

c. 125.6(b) requires a written certification if the export is via visual means. But this would be feasible only if the disclosure is based on an agreement. The proprietor of a facility cannot monitor, let alone certify, casual visual inspection by a foreign person.

31. Filing of Licenses for Exports of Unclassified Technical Data

a. 125.8 requires presentation of licenses for the export of unclassified technical data to Customs or the Postmaster, who will endorse them or, if not endorsed by them for whatever reason, the exporter must self-endorse the license. It is odd to require presentation to a government official for endorsement while permitting, for whatever reason, self-endorsement.

b. 125.8 requires return of the license to ODTC after endorsement. However, this would not be feasible for early shipments under a license permitting multiple shipments.

32. Proscribed Destinations

a. The list of proscribed destinations in 126.1 excludes the following, which were the subject of Federal Register Notices suspending licenses: Cyprus armed forces November 18, 1992; India May 20, 1998; Indonesia September 10, 1999; Nigeria July 30, 1993, and December 21, 1995; Pakistan June 17, 1998; and Yemen November 16, 1992.

b. Guatemala is listed as a proscribed destination in 22 CFR 129.5(c); but the July 19, 1993, Federal Register Notice concerning Guatemala called only for case-by-case review.

33. Canadian Exemptions

a. 126.5(a) permits "the export or temporary import without a license . . . from Canada for end-use in the United States. . . ." A temporary import would not be for end-use in the United States. Permanent imports are regulated by Treasury rather than by State.

34. Denial or Revocation of Licenses

a. 126.7 refers to 127.6 and 127.10. The cross-references should be to 127.7 and 127.11.

b. 126.7 states that licenses or approvals shall be denied or revoked whenever required by any statute of the United States. The only statute cited in the 127.7 and 127.11 cross-references is 22 USC 2778(g)(4), which prohibits issuing a license to a person convicted of violating a cited statute or ineligible to receive export licenses from any USG agency unless the President finds, after a thorough review of the circumstances, that appropriate steps have been taken to mitigate any law enforcement concerns. The 127.7(c) and 127.11(b) descriptions of this exception go beyond the statute by:
   — inserting "extraordinary" before "circumstances";
   — inserting "and other legitimate" before "concerns";
   — adding "and to deal with the causes that resulted in the conviction, ineligibility, or debarment" after "concerns"; and
   — establishing a policy not to consider applications for licenses for a three year period following conviction.

c. 126.7(a)(1) establishes a policy to deny or revoke licenses or approvals whenever such action not only would be in furtherance of world peace, the national security or the foreign policy of the United States (language from 22 USC 2778(a)(1)) but also would be "otherwise advisable." The statutory language is extraordinarily broad. The regulatory addition makes the policy completely open-ended.

d. The 126.7(a)(2) policy to deny when State believes a party to the export has violated the EAA goes beyond the 22 USC 2778(g)(3)(B) statute on which it is based by:
   — relying on a State belief, whereas the President has delegated EAA authority to Commerce; and
   — making the test "believes," whereas the law states "reasonable cause to believe."

   On the other hand, the statute goes beyond the regulation by referring to any of the statutes listed in 120.27, not just the EAA.

e. 126.7(a)(3) and (4) make no distinction between the effects of an indictment and the effects of a conviction, whereas 22 USC 2778(g)(3) states that the President "may disapprove" the application in the event of an indictment but 22 USC 2778(g)(4) states that a license "may not be issued" in the event of a conviction, unless "appropriate steps have been taken to mitigate any law enforcement concerns."

35. Approval of Proposals

a. 126.8(a) requires prior approval of a proposal even if the United States would already be informed because the proposal was based on an inter-governmental agreement to which the United States was a party.
b. 126.8(c)(1)(iii) reference to a temporary export license for a demonstration to the armed forces of "the country of export" probably is intended to mean the armed forces of the country of import from the United States.
c. 126.8(e)(1) refers to a "sale" which meets paragraph (a) criteria. But (a) concerns proposals for sale, not the subsequent sale.

36. Advisory Opinions

a. The 126.9 requirement to "outline in detail" information needed in a request for an advisory opinion is internally contradictory.
b. The 126.9 word "equipment" should, in context, be changed to the broader expression "defense article or defense service."

37. Violations

a. 127.1(b) holds any person granted a license responsible for the acts of persons to whom possession has been entrusted regarding use abroad. But it is unreasonable for an exporter to be held responsible for the violations of others after the export has taken place if he had no reason to anticipate such violations.
b. 127.1(b) omits any reference to the responsibilities of freight forwarders, carriers, or other persons in the United States (other than the exporter).

c. 127.1 contains no provision similar to 15 CFR 764.2(e) to prohibit a transfer in the United States knowing that it will be exported in violation of the AECA or any regulation, order, license, or other authorization under the Act.

38. Customs

a. 127.4(a) states that Customs may act to ensure observance of export regulations. But Customs also has jurisdiction over imports.
b. 127.4(a) states that this applies whether the export is authorized by license or by written approval. But it also applies to attempted exports which are neither licensed nor approved, as indicated in 127.4(b).
c. 127.4(c) states that Customs may require an invoice, order, packing list, shipping document, correspondence, instructions "and the documents otherwise required by the U.S. Customs Service." If there are other types of documents required by Customs, they should be identified.

39. Interim Suspension

a. 127.8(a) refers to a finding that interim suspension is reasonably necessary to protect world peace or the security or foreign policy of the United States. It is unlikely that any one interim suspension would be "necessary" for such broad objectives.

40. Administrative Procedures

a. The second sentence of 22 CFR 128.6(a) states:

> The Office of Defense Trade Controls may provide any relevant information, not privileged, that may be necessary or helpful in preparing a defense (underlining added).

ODTC should be obliged to provide information, not privileged, that is necessary in preparing a defense.
b. 22 CFR 128.9(b) is silent as to whether the respondent, under any circumstances, might see the report from the Administrative Law Judge to the Assistant Secretary.
c. 22 CFR 128.10 states that the Administrative Law Judge's recommendation shall be advisory only and that the Assistant Secretary for Political-Military Affairs shall make

an appropriate disposition of the case. However, the next sentence states that "the Director may issue an order . . . or take such action as the Administrative Law Judge deems appropriate."

d. 22 CFR 128.11 states that cases which are settled may not be reopened; but 22 CFR 128.12 states that the Administrative Law Judge may reopen a proceeding to hear evidence not known or obtainable at the time of the original hearing.

e. 22 CFR 128.15 states that ODTC may apply for an order revoking probation "without notice to any person to be affected thereby"; that the Administrative Law Judge will make a recommendation to the Assistant Secretary, who will make a determination and issue an order. At some point before action is taken the person affected should be notified and provided an opportunity to defend himself. An after-the-fact opportunity to object, which would not stay the effective date of the order (per 128.15(b)(2)) is hardly due process.

f. Typos:
   - 128.2 change "of" the Department of Commerce to "by"
   - 128.2 change 788.2 to 766.2
   - 128.4(b) change "to duplicate" to "in duplicate"
   - 128.4(b) change "Administrative law Judge" to "Administrative Law Judge"
   - 128.6(a) change "in place or original documents" to "in place of original documents"
   - 128.6(c) change "by he Administrative Law Judge" to "by the Administrative Law Judge"
   - 128.7(a)(1)(ii) change "necessity of desirability" to "necessity or desirability"
   - 128.15(b)(2) delete comma in "order revoking probation, without notice may request"

41. Brokering Activities

a. 22 CFR 129.3(b)(3) exempts persons engaging merely in specified activities from a registration requirement; but it is unclear whether these activities are also excluded from the term "brokerage activities."

b. 22 CFR 129.5(e) last sentence states:

> Any person who knows or has reason to know of brokering activities involving such countries or persons must immediately inform the Office of Defense Trade Controls.

This would violate the 5th amendment to the Constitution to the extent that the information would be self-incriminating. If the informant was not somehow involved in the activity, it is doubtful that he would have sufficient evidence to know or have reason to know.

c. 22 CFR 129.7(a)(2) establishes a license requirement if any of four factors are present. The negative construction of factors (ii) and (iv) leads to confusion. The first factor is significant military equipment (SME) valued at $1,000,000 or more. The second factor appears to nullify that value limit by covering SME of any value unless it has been previously licensed for export to the armed forces of the country concerned or has been approved for sale under the Foreign Military Sales (FMS) Program. The fourth factor also appears to nullify the value limit, in this case unless the recipient is a foreign government or international organization. Since armed forces of the country concerned and FMS recipients are foreign government entities, the second factor is subsumed by the fourth factor. Any coverage of SME less than $1,000,000 in 129.7 would appear to be inconsistent with 129.8, which covers SME less than $1,000,000.

42. Political Contributions, Fees, and Commissions

a. 130.10(c) provides that detailed information specified in (a)(4) and (b) need not be included if payments do not exceed $2,500 political contributions and $50,000 fees or commissions. But these are the relevant limits for individual payments. If the aggregate limits in 130.9(a) and (b) are not exceeded, no report at all is required, regardless of the amounts of individual payments.

b. 130.12(c) contains a typographical error. The expression "or offered or agreed to be paid" appears twice (as it did in the May 7, 1992, proposed rule!)

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CHAPTER 3

TREASURY OFAC CONTROLS

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Table 3-1 Checklist of Information for Proposed Transaction by a U.S.-Owned or Controlled Foreign Firm Pursuant to Section 515.559 of the Cuban Assets Control Regulations

3.1 GENERAL

The Office of Foreign Asset Controls (OFAC) in the Department of the Treasury administers broad financial and economic sanctions against pariah countries. Some of these controls explicitly include export prohibitions; some do not.

Explicit OFAC export controls involve virtually total embargoes of North Korea, Cuba, Iran, Iraq, Libya, Sudan, Serbia (but not Montenegro nor Kosovo), and the Taliban-controlled portions of Afghanistan and selective controls targeting former COCOM-proscribed countries plus Cambodia and the UNITA-controlled portion of Angola.

OFAC regulations which do not explicitly control exports target the following countries: Burma, Colombia (narcotic traffickers), and terrorist supporting countries (which include Syria as well as North Korea, Cuba, Iran, Iraq, Libya, and Sudan, which are otherwise subject to total embargoes). Export transactions involving these countries may require specific authorization from OFAC to overcome financial controls, even though these particular OFAC regulations do not mention exports.

Exports to countries not mentioned in OFAC regulations might also constitute violations of those regulations, because of OFAC controls on sales to proscribed government entities wherever located and on transshipments and reexports. Exporters should also be aware that OFAC controls exports by U.S. persons wherever located even if the items are of foreign-origin. The term "U.S. persons" includes foreign branches of U.S. firms. In addition, OFAC imposes import sanctions on designated foreign persons whose exports would assist a weapons of mass destruction capability.

This chapter describes export controls administered by OFAC. These are identified in summary fashion in the Chapter 1 Overview.[1]

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[1] See especially:

- The Treasury entries in Table 1-2 on Agencies Controlling Exports.
- The brief narrative discussion of Treasury controls in section 1.1.
- The analysis of overlapping agency jurisdiction between Treasury and State Munitions in section 1.2.1.1, between Treasury and Energy and between Treasury and NRC in section 1.2.3.1, between Treasury and Commerce BXA in section 1.2.3.2, and between Treasury and Patent Office in section 1.2.3.3.

3.1.1 Legislative Authority

Until 1977, OFAC controls were authorized primarily by Section 5(b) of the Trading With the Enemy Act of 1917 (TWEA).[2] That provision conferred authority upon the President, during time of war or during any other period of national emergency which he declares, to impose restrictions on foreign assets within U.S. jurisdiction and upon trade between the United States and foreign countries. Targeted countries were North Korea, the People's Republic of China, North Vietnam (before 1975), all of Vietnam (after 1975), Cambodia, Cuba, and Rhodesia. Additional authority for Cuban controls is in the Foreign Assistance Act of 1961, as amended.[3] Additional authority for the Rhodesian sanctions was in the United Nations Participation Act of 1945.[4] Treasury controls with respect to the People's Republic of China and Rhodesia were removed prior to 1977.

In 1977, Congress concluded that the Executive Branch had abused the TWEA 5(b) emergency authority by, *inter alia*, basing new controls on old, non-germane, declared emergencies and by overuse of the authority in order to avoid Congressional oversight.[5] The 1977 law removed national emergency powers from TWEA and limited future use of TWEA to wartime situations. However, the 1977 legislation contained a grandfather clause,[6] under which authorities being exercised with respect to a country on July 1, 1977, could be extended for one-year periods upon Presidential determinations that this was in the national interest.

The authorities being exercised on July 1, 1977 involved virtually total embargoes on North Korea, Vietnam, Cambodia,

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- Transaction types which are controlled exclusively by Treasury per entries (g) and (j) of Tables 1-3, 1-4, and 1-5 and the discussions thereon in sections 1.4.1.8 and 1.4.2.6.
- Transaction types controlled by Treasury and by other agencies per entries (a), (b), and (c) of those Tables.
- Treasury-related Steps (2)(c), (3), (8), and (10) in the Table 1-6 Decision Tree to Determine Agency Jurisdiction.

[2] 50 U.S.C. App. 1-44.
[3] 22 U.S.C. § 2370(a).
[4] 22 U.S.C. § 287(c).
[5] Pub. L. No. 95-223 of Dec. 28, 1977.
[6] Pub. L. No. 95-223, § 101(b).

and Cuba and so-called "Transaction Controls" on the export of COCOM-listed dual-use, munitions, and nuclear items to COCOM-proscribed destinations by persons subject to U.S. jurisdiction located in non-COCOM-member countries. Exports to Cambodia became eligible for an OFAC general license effective January 3, 1992. The embargo on Vietnam was lifted on February 3, 1994. Transaction Controls were removed except for items controlled under the Arms Export Control Act and the Atomic Energy Act on June 30, 1995. But North Korea and Cuba controls and the remaining Transaction Controls continue under the authority of the TWEA grandfather clause plus annual Presidential national interest determinations from September 14 in one year to September 14 in the next year.

With respect to North Korea and Cuba, Treasury has deferred to Commerce to control exports from the United States and reexports of U.S.-origin items from third countries. Therefore, Treasury controls on exports to these countries are limited, *de facto*, to non-U.S.-origin items exported from third countries by persons subject to U.S. jurisdiction, primarily overseas subsidiaries of parent companies located in the United States.

The 1977 legislation included an International Emergency Economic Powers Act (IEEPA).[7] IEEPA authorized future controls based on new declarations of germane national emergencies. Since 1977, IEEPA authority has been used by OFAC to control exports to Iran, Nicaragua, Libya, Panama, Iraq, Kuwait, Haiti, Yugoslavia, UNITA (Angola), Sudan, and the Taliban-controlled portions of Afghanistan. The OFAC Iranian export controls were removed when U.S. hostages, taken at the American Embassy in Tehran in 1979, were released in 1981; but they were reimposed in 1995. The OFAC Nicaraguan and Panamanian export controls were removed following the Nicaraguan election which the Sandinistas lost and the departure from Panama of Noriega. Kuwaiti controls were removed in 1991. The embargo of Haiti was lifted in 1994. Sanctions against Yugoslavia (Serbia and Montenegro) were suspended in 1996 and the 1998 reimposition of sanctions in response to events in Kosovo did not include explicit control of exports. In May 1999 an export embargo against Serbia, but not Montenegro was imposed. In November 1999 the Serbian province of Kosovo was removed from embargo. Therefore, as of January 1, 2000, OFAC targets,

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[7] Title II of Pub. L. No. 95-223 of Dec. 28, 1977.

under IEEPA authority, Libya, Iraq, UNITA (Angola), Iran, Serbia excluding Kosovo, Sudan, and the Taliban-controlled portions of Afghanistan.

The 1977 legislation amended the Export Administration Act (EAA) to authorize Commerce to control exports by any person subject to U.S. jurisdiction.[8] The purpose of this amendment was to place the authority for exports of non-U.S.-origin items by U.S. overseas subsidiaries in legislation which was periodically reviewed by the Congress, *i.e.*, when the EAA came up for renewal. This authority was used in 1981 by Commerce to control exports by U.S. overseas subsidiaries to the Soviet Union of non-U.S.-origin gas pipeline equipment. However, the countries in Western Europe where the subsidiaries were located refused to cooperate and this Commerce control was removed in 1982.

Although the EAA expired without renewal in 1994, Commerce arguably could, nevertheless, control exports by any person subject to U.S. jurisdiction using IEEPA authority, as Treasury now does. Commerce has never sought to assume jurisdiction from Treasury for the export controls Treasury was exercising in 1977, even though this was the apparent Congressional intent.

3.1.2 Objectives

The purposes of OFAC regulations vary from country to country. Generally they are:

- First, to prevent the designated nation from earning hard currency from the United States.
- Second, to freeze assets of these countries located in the United States until private expropriation claims of U.S. citizens are settled or other U.S. objectives are achieved.
- Third, to restrict exports.

This book addresses the third objective of overt export control and the indirect impact on exports of controls on financial transactions.

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[8] Title III of Pub. L. No. 95-223.

3.1.3 Software and Technical Data

OFAC control of software and technical data (or technology) is explicit for Libya,[9] Iraq,[10] Iran,[11] Sudan,[12] Serbia less Kosovo,[13] and Taliban.[14] North Korean and Cuban regulations and Transaction Controls affecting COCOM-proscribed destinations do not use the words "software," "technical data," or "technology." However, OFAC interprets the words "property"[15] and "merchandise"[16] as covering software and technical data. This interpretation is supported by the inclusion of "services" in the definition of "property,"[17] since State includes furnishing "technical data," which includes software, in its ITAR definition of "defense services."[18] Transactions involving "property" in which North Korea or its nationals have an interest are prohibited.[19]

Information and informational materials not subject to Commerce security export controls nor prohibited by chapter 37 of title 18 of the United States Code are exempted from OFAC controls for North Korea, Cuba, Iran, and Sudan.[20] On August 2, 1995, the definition of exempted information and informational materials was expanded to include compact discs, CD-ROMs, artworks, and news wire feeds.[21]

The principal effect of information and informational materials provisions, although phrased as exemptions, is to clarify that, to the extent not already controlled by Commerce, Treasury controls software and technology as defined in items on the Commerce Control

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[9] 31 C.F.R. § 550.202.

[10] 31 C.F.R. §§ 575.205 and 575.411.

[11] 31 C.F.R. § 560.204.

[12] 31 C.F.R. §§ 528.205 and 538.411.

[13] 31 C.F.R. § 586.

[14] Exec. Order No. 13129, 64 Fed. Reg. 36759 (July 4, 1999).

[15] 31 C.F.R. §§ 500.201 and 515.201.

[16] 31 C.F.R. § 505.10.

[17] 31 C.F.R. § 500.311.

[18] 22 C.F.R. § 120.9(a)(2).

[19] 31 C.F.R. § 500.201.

[20] 31 C.F.R. §§ 500.206, 500.332, 515.206, 515.332, 560.210(c), 560.315, 538.211(b), 538.306.

[21] This was to comply with the amendment to TWEA § 5(b)(4) in § 525(b) of the Foreign Relations Authorization Act for Fiscal Years 1994 and 1995 in Pub. L. No. 103-236, 108 Stat. 474.

List which are identified as controlled for national security (NS) reasons. For example, Treasury, rather than Commerce, controls such items if they are non-U.S.-origin and are exported from foreign countries by U.S. persons.

A secondary, probably unintentional, effect is to remove from OFAC controls to North Korea, Cuba, Iran, and Sudan software and technology related to munitions or to nuclear items controlled by State or Energy and software and technology on the Commerce List controlled for nuclear, missile, or chemical and biological weapons reasons unless also controlled for national security reasons.

3.1.4 U.S.-Origin Items Transformed

To Libya and Iran, control on the export of U.S.-origin items substantially transformed in a third country is largely limited to such items in products to be used in the petroleum or petrochemical industry.[22] To Iraq and Sudan, controls apply to exports from the United States for incorporation or substantial transformation into a third country product to be used in one of those countries.[23]

3.1.5 Foreign-Origin Items Transformed

OFAC prohibitions apply to transactions involving:

> Merchandise the country of origin of which is North Korea and which is subjected elsewhere to one or more of specified processes.[24] Merchandise made or derived in whole or in part of any article which is the growth, produce, or manufacture of Cuba.[25]

Importation into the United States of goods containing raw materials or components of Sudanese origin is not prohibited if the raw materials or components are substantially transformed in a third country.[26] However, U.S. persons may not transform Sudanese goods outside the United States.[27]

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[22] 31 C.F.R. § 550.409(a)(2), 31 C.F.R. § 560.511.
[23] 31 C.F.R. § 575.411(a), 31 C.F.R. § 538.411.
[24] 31 C.F.R. § 500.204(a)(1).
[25] 31 C.F.R. § 515.204(a)(3).
[26] 15 C.F.R. § 538.410(a).
[27] 31 C.F.R. § 538.408(b).

3.1.6 Foreign Product of U.S. Data

Libyan Sanctions Regulations control technology used in a third country in the manufacture of, or for incorporation into, products to be used in the petroleum or petrochemical industry.[28]

Technology may not be exported to a third country for the production of goods to be exported predominantly to Iran.[29]

3.1.7 License Applications

OFAC license procedure regulations are centralized in one place for all the targeted countries.[30]

Applications for specific licenses to engage in a prohibited export transaction may be filed by letter addressed to:

> Office of Foreign Assets Control, U.S. Department of the Treasury
> 1500 Pennsylvania Avenue NW - Annex
> Washington, D.C. 20220.[31]

There are Treasury license application forms.[32] However, unlike for Commerce and State licenses, an applicant for a Treasury license need not use a government form. Indeed, even if a Treasury form were used, a letter would also have to be sent.

Any person having an interest in a transaction may file an application for a license, provided that all parties in interest are disclosed in the application.[33] This differs from the Commerce requirement that the license applicant be the principal party in interest, with the power and responsibility for determining and controlling the export or reexport.[34]

An applicant must supply a tax identification number.[35] There is no such Commerce requirement.

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[28] 31 C.F.R. § 550.409(a)(3).
[29] 31 C.F.R. § 560.204.
[30] 31 C.F.R. § 501.
[31] 31 C.F.R. § 501.601(b)(2,7).
[32] The one for an export to Cuba is TD F 90-22.
[33] 31 C.F.R. § 501.601(b)(2,3).
[34] 15 C.F.R. § 748.5(a)(1).
[35] 31 U.S.C. § 7701; 31 C.F.R. § 501.601(b)(3).

Denial does not preclude reapplying or requesting the reasons for denial.[36] However, Treasury regulations do not require notifying the applicant of intent to deny nor providing the applicant with an opportunity to respond to such intent, comparable to Commerce procedures.[37]

3.2 NORTH KOREA

Treasury regulations called "Foreign Assets Controls" govern exports to North Korea.

3.2.1 Transactions Prohibited

Generally, the regulations proscribe credit or cash transactions between a U.S. person and North Korea or North Korean nationals whether the transactions occur within or without the United States, so long as the property involved is subject to U.S. jurisdiction. That includes securities located in the United States as well as physical assets situated in the United States.[38] No person within the United States may export or allow to be withdrawn any gold or silver coin or bullion, currency, or securities to North Korea or North Korean nationals. The regulations also prohibit:[39]

> All dealings by any persons subject to U.S. jurisdiction involving any property, whether or not the property is subject to U.S. jurisdiction.
>
> Any transfers of any property subject to U.S. jurisdiction, whether or not located within the United States.

Years ago, OFAC issued a general license for non-U.S.-origin items but excepted COCOM-controlled items from this general license.[40] However, this general license no longer exists.[41] Accordingly, Treasury now controls the export of all non-U.S.-origin items to North Korea by persons subject to U.S. jurisdiction.

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[36] 31 C.F.R. § 501.601(b)(4).

[37] 15 C.F.R. § 750.6.

[38] 31 C.F.R. § 500.313.

[39] 31 C.F.R. § 500.201.

[40] 31 C.F.R. § 500.541.

[41] The reference to 31 C.F.R. § 500.541 in the current version of the Transaction Control general license for exports from former-COCOM-member countries in 31 C.F.R. § 505.31(a) is an error.

3.2.2 Exceptions

There are three exceptions from the requirement for obtaining a special OFAC authorization for any commodity or technical data export to North Korea:

1. Transactions authorized by the Department of Commerce.[42]
2. Information and informational materials except for Commerce-controlled items.[43]
3. Donations to meet basic human needs of victims of natural disasters through the United Nations or the Red Cross.[44]

The exclusion of Commerce-controlled items from the information and informational materials exemption appears to be inconsistent with the exemption for transactions authorized by Commerce. However, the effect is to retain under Treasury control exports from foreign countries by U.S. persons of non-U.S.-origin items which are controlled by Commerce if of U.S.-origin.

Specific licenses may be issued in connection with North Korea's transition to light-water reactor power plants.[45]

A 1999 Presidential determination to ease the embargo on exports to North Korea has, as of May 1, 2000, not been implemented by regulation. It is expected that the consumer goods portion of EAR99 on the Commerce Control List[46] will be removed from control. Difficulty is being experienced in defining such "consumer goods."

3.2.3 U.S. Person

The term, "person subject to the jurisdiction of the United States," includes:[47]

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[42] 31 C.F.R. § 500.533.

[43] 31 C.F.R. § 500.206.

[44] 31 C.F.R. § 500.573.

[45] 31 C.F.R. § 500.584.

[46] 15 C.F.R. § 774 (Supp. 1).

[47] 31 C.F.R. §§ 500.329 and 500.330. By exclusion, a natural person who is a non-resident alien and not physically located within the United States is not a "person subject to the jurisdiction of the United States," nor is an entity not organized under U.S. law or owned or controlled by an entity or a natural person not subject to U.S. jurisdiction.

- Any individual, wherever located, who is a citizen or resident of the United States.
- Any person actually within the United States.
- Any corporation organized under U.S. law.
- Any entity owned or controlled by any of the above.

3.2.4 Travel

U.S. person travelers may purchase in North Korea merchandise for personal use only, to be imported into the United States as accompanied baggage, up to a limit of $100 in any six consecutive months.

3.3 COCOM-PROSCRIBED COUNTRIES

OFAC Transaction Controls prohibit, except as specifically authorized, any person within the United States from arranging a transaction involving the shipment from any foreign country of items subject to controls under the Arms Export Control Act or the Atomic Energy Act to a country formerly on the list of COCOM-proscribed destinations[48] or Cambodia.[49]

3.3.1 Exceptions

An OFAC general license authorizes shipments from former COCOM member or cooperating countries except to North Korea.[50] This old general license was based on the assumption that the United States had the opportunity to review such exports in COCOM. This assumption is, of course, no longer correct. The OFAC general license does not remove the requirement for a license from another agency for reexports of U.S.-origin items but it does remove all

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[48] The affected former COCOM-proscribed countries are Albania, Bulgaria, Czech Republic, Estonia, North Korea, Latvia, Lithuania, Mongolia, People's Republic of China, Poland, Romania, Slovak Republic, Vietnam, and the geographic area formerly known as the USSR, *i.e.*, Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Russia, Tajikistan, Turkmenistan, Ukraine, and Uzbekistan.

[49] 31 C.F.R. § 505.10.

[50] 31 C.F.R. § 505.31.

U.S. controls on exports from cooperating countries to countries not otherwise subject to OFAC embargoes of non-U.S.-origin items arranged by a U.S. person.

3.3.2 Items Controlled by Commerce

The reference in Transaction Controls to the Atomic Energy Act literally includes not only nuclear items controlled by the Nuclear Regulatory Commission or the Department of Energy but also nuclear-related items controlled by the Department of Commerce. These nuclear-related items are marked NP, for nuclear proliferation, on the Commerce Control List. Section 309(c) of the Nuclear Non-Proliferation Act of 1978 (NNPA) requires such Commerce controls. The NNPA was an amendment to the Atomic Energy Act. However, OFAC may not interpret Transaction Controls as covering NP items, because such items are also controlled under the authority of the Export Administration Act (EAA) and reference to the EAA was removed from Transaction Controls in 1995.

3.4 CUBA

Cuban Assets Control Regulations parallel closely, for Cuba, Foreign Assets Control Regulations, which apply to North Korea.[51] However, Cuban controls are more restrictive than North Korean controls concerning subsidiary exports, U.S.-origin parts, travel by individuals, shipping, telecommunications, and gifts. Cuban controls on food and agricultural products are less restrictive than North Korean controls; but this is expected to change when restrictions on exports to North Korea of consumer goods are removed.

3.4.1 Exports from Subsidiaries

The Cuban Democracy Act (CDA) of 1992[52] prohibits licenses for trade with Cuba to entities owned or controlled by a U.S. person and located in third countries unless for medicine, medical equipment, or telecommunications equipment. Even the eligibility of medicine or medical equipment is qualified by five exceptions

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[51] Discussed in section 3.2 *supra*.

[52] Pub. L. No. 102-484, §§ 1701-12.

from the exception and the telecommunications equipment must be necessary for service between the United States and Cuba.[53]

A checklist for a proposed transaction under this regulation is at Table 3-1. Regarding A6 and A7 on this list, there would be no point in applying unless the commodity were a medicine, medical equipment, or telecommunications equipment.

3.4.2 U.S. Parts

Commerce licensing policy is generally to deny to Cuba U.S. parts amounting to more than 20 percent by value of the foreign-made product.[54] If the U.S. content is 10 percent or less,

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[53] 31 C.F.R. § 515.559(a). But 31 C.F.R. § 515.559(b-d) states that licenses may be issued for exports to Cuba of non-former-COCOM-listed commodities and related maintenance, repair, and operations data by U.S.-owned or controlled firms in third countries where local law requires, or policy in the third country favors, trade with Cuba, provided that:

The commodities are produced in the third country;
Commerce has authorized any U.S.-origin parts;
No U.S. dollar accounts are involved;
Any credit by a U.S.-owned or controlled firm is short-term;
No person within the United States is involved; and
The U.S. affiliate in the third country is generally independent.

From 1977 until December 23, 1988, the regulation included the following:

> For purposes of this section (515.559), an affiliate is not independent if there are a substantial number of officers or directors of the foreign affiliate who are also officers or directors of a person within the United States.

In 1977 Canada protested the sentence, on the ground that it largely negated the intent of the liberal Treasury licensing policy introduced in 1975 at Canada's insistence. Eleven years later, the sentence was finally removed.

Retention of 31 C.F.R. § 515.559(b-d), old (a-c), is confusing because new (a) put severe limits on licensing discretion even if all the conditions of (b-d) were met. In effect, 515.559(a), which is required by the CDA, makes controls on exports by U.S. subsidiaries substantially more restrictive than they had been between 1977 and 1988 by limiting the commodities which may be licensed to medicine, medical equipment, and telecommunications equipment.

[54] 15 C.F.R. § 746.2(b)(3)(ii).

Commerce generally requires no prior written approval.[55] However, this is now relevant to Treasury controls on exports by subsidiaries only for medicine, medical equipment, and telecommunications equipment.

3.4.3 Travel

A general license authorizes transactions incident to travel by government officials, by journalists, or to visit close relatives in instances of extreme humanitarian need no more than once in any 12-month period. Specific licenses may be issued for other extreme humanitarian cases or for compelling professional research, educational, religious, human rights, or transmission of information reasons, but not for tourism.[56]

Thus, unlike the situation for North Korea, business travel to Cuba by persons subject to U.S. jurisdiction is possible only if Cuban hosts pay all expenses.

3.4.4 Shipping

Any vessel carrying passengers or goods to or from Cuba or goods in which Cuba or a Cuban national has an interest is prohibited from entry into any U.S. port except as specifically authorized by OFAC.[57] Use of the ship stores portion of Commerce License Exception AVS is not authorized.[58] Travelers must obtain authorization for carriage of any unaccompanied merchandise, cargo, or gifts.[59]

Entry of a vessel into the United States to load or unload any freight is prohibited if the vessel had entered Cuba in the trade of goods or services within the previous 180 days.[60]

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[55] 15 C.F.R. § 734.4(a,b,e,h) excepts from this liberal treatment parts for computers exceeding 12,300 mtops, encryption items, spacecraft, technology or source code to design or produce foreign-made items, and specified aircraft technology.

[56] 31 C.F.R. §§ 515.416, 515.417, 515.419, and 515.560.

[57] 31 C.F.R. § 515.207.

[58] 31 C.F.R. § 515.533(b).

[59] 31 C.F.R. § 515.560(k).

[60] 31 C.F.R. § 515.207(a).

3.4.5 Telecommunications

Telecommunications receipt and transmission services between the United States and Cuba are generally authorized.[61] However, specific licenses are required for any payments to Cuba for such services.[62]

3.4.6 Gifts

Commerce License Exception GFT may be used only for food, medical items, clothing, fishing equipment, soap-making equipment, and specified radio equipment.[63]

3.4.7 Food and Agricultural Items

Effective May 13, 1999, Commerce established a licensing policy to approve exports of food (both solids and liquids) and agricultural commodities on a case-by-case basis for use by independent non-government entities in Cuba. Agricultural commodities considered for approval include, but are not limited to, insecticides, herbicides, pesticides, seeds, and fertilizer. Agricultural equipment is not eligible for this approval policy.[64]

3.5 IRAQ

Exports to Iraq from the United States, or, if subject to U.S. jurisdiction, from foreign countries, of any goods, technology, or services are prohibited.[65]

3.5.1 Exceptions

Exceptions from OFAC license requirements for export to Iraq are as follows:

- Exports eligible for Commerce License Exceptions BAG or the U.S. Government portion of GOV.[66]

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[61] 31 C.F.R. § 515.542(b).
[62] 31 C.F.R. § 515.542(c).
[63] 31 C.F.R. § 515.533(d).
[64] 15 C.F.R. § 746(b)(4)(iii).
[65] 31 C.F.R. § 575.205.
[66] 31 C.F.R. § 575.507(a)(1).

- Exports for the official use of the United Nations, its personnel and agencies, excluding its relief or development agencies.[67]
- Receipt and transmission of telecommunications and mail.[68]
- U.S. persons to enter into executory contracts with the Government of Iraq for the sale of essential parts and equipment for the Kirkuk-Yumurtalik pipeline system and oilfield parts and equipment consistent with UN Security Council Resolutions.[69]

3.5.2 Licensing Policy

Specific licenses may be issued for donations to Iraq of foodstuffs in humanitarian circumstances and donated supplies intended strictly for medical purposes, pursuant to United Nations-approved resolutions.[70]

3.6 IRAN

Iranian Transaction Regulations issued September 11, 1995, as amended April 26, 1999, prohibit:

- Exports to Iran or the Government of Iran from the United States, or, if by a U.S. person, from a foreign country, of goods, technology, or services.[71]
- Exports for the production of, commingling with, or incorporation into goods, technology, or services to be reexported exclusively or predominantly to Iran.[72]
- Reexports of U.S.-origin items by other than a U.S. person intended specifically for Iran or the Government of Iran if the items were subject to the license requirements of another agency on May 6, 1995, or thereafter were made subject to such requirements imposed independently of this OFAC control.[73]

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[67] 31 C.F.R. § 575.507(a)(2).
[68] 15 C.F.R. §§ 575.513 and 575.514.
[69] 31 C.F.R. § 575.522.
[70] 31 C.F.R. §§ 575.205, 575.520, and 575.521.
[71] 31 C.F.R. §§ 560.204(a) and 560.410.
[72] 31 C.F.R. § 560.204(b).
[73] 15 C.F.R. § 560.205(a).

- Brokering services related to prohibited exports or reexports.[74]
- Release of technology or software in the United States or by a U.S. person wherever located if known to be intended for Iran or the Government of Iran (Iranians normally in Iran may be employed by a U.S. person only if authorized by a U.S. visa).[75]

U.S. persons must also report specified oil-related transactions by foreign affiliates which are not themselves U.S. persons but are owned or controlled by a U.S. person.[76]

Prior to the 1999 revision of Iranian controls, the only U.S. controls on the export from foreign countries of the product of technology were limited to Commerce controls on exports to North Korea, Cuba, Libya, and COCOM-proscribed countries of products controlled for national security reasons which were the direct product of U.S. software and technology.[77] The OFAC Iranian control not only adds Iran but also goes beyond the Commerce control by covering any product and covering non-U.S.-origin technology transferred from a foreign country by a U. S. person.

The OFAC Iranian release of technology or software rule, known as deemed export, being limited to what is known to be intended for Iran, is less restrictive than the Commerce deemed export rule, which is not so limited.

3.6.1 Exceptions

Exceptions from OFAC license requirements for export to Iran are as follows:

- Reexport of U.S.-origin goods by non-U.S.-persons substantially transformed outside the United States, or incorporated into another product outside the United States which constitute less than 10 percent by value of that product, although the OFAC regulation notes that such reexports may require a Commerce license.[78]

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[74] 31 C.F.R. § 560.416.
[75] 31 C.F.R. §§ 560.401 and 560.419.
[76] 31 C.F.R. § 560.603.
[77] 31 C.F.R. § 736.2(b)(3).
[78] 31 C.F.R. §§ 560.205(b) and 560.420.

- Personal communications not transferring anything of value.[79]
- Donations by U.S. persons of articles intended to relieve human suffering.[80]
- Fully created information and informational materials not subject to Commerce controls and not including sale or leasing of telecommunications transmission facilities.[81]
- Travel transactions.[82]
- Gifts valued at no more than $100 not subject to Commerce national security, chemical and biological warfare, nuclear non-proliferation, or missile technology controls.[83]
- Unaccompanied baggage.[84]
- Receipt and transmission of telecommunications and mail.[85]
- Intellectual property.[86]
- Export from the United States or by a U.S. person wherever located of goods or technology substantially transformed or incorporated into a foreign-made item in a country other than the United States or Iran if:
  —the U.S. content was not controlled on May 6, 1995, or thereafter independently of OFAC controls;
  —the U.S. content consists of less than 10 percent by value of the foreign-made item; and
  —the foreign-made item is not intended for use in the Iranian petroleum or petrochemical industry.[87]
- Exports by missions of the Government of Iran.[88]
- Diplomatic pouches.[89]

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[79] 31 C.F.R. § 560.210(a).
[80] 31 C.F.R. § 560.210(b).
[81] 31 C.F.R. § 560.210(c).
[82] 31 C.F.R. § 560.210(d).
[83] 31 C.F.R. § 560.506.
[84] 31 C.F.R. § 560.507.
[85] 31 C.F.R. § 560.508.
[86] 31 C.F.R. § 560.509.
[87] 31 C.F.R. § 560.511.
[88] 31 C.F.R. § 560.512.
[89] 31 C.F.R. § 560.521.

- Household goods and personal effects.[90]
- Legal services.[91]

3.6.2 Licensing Policy

With respect to Iran, specific licenses may be issued for:

- Transactions related to activities of the Iran-United States claims tribunal.[92]
- The operation of news bureaus.[93]
- Equipment for transmission of information or informational materials.[94]

The OFAC regulation to prohibit reexports to Iran which are subject to the license requirements of other agencies would appear to serve no purpose unless Treasury intended to apply a more restrictive licensing policy than other agencies.

3.7 LIBYA

OFAC Libyan controls prohibit, except as authorized:

- Exports of goods, technology, or services to Libya from the United States.[95]
- Exports of property of the Government of Libya in the United States to any destination.[96]
- Exports to the Government of Libya by U.S. persons from any country to any country, *e.g.*, a U.S. person may not, within the United States or abroad, deal in Libyan crude oil or petroleum products refined in Libya.[97]

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[90] 31 C.F.R. § 560.524.
[91] 31 C.F.R. § 560.525.
[92] 31 C.F.R. § 560.510.
[93] 31 C.F.R. § 560.519.
[94] 31 C.F.R. § 560.523(b).
[95] 31 C.F.R. § 550.202.
[96] 31 C.F.R. § 550.209.
[97] 31 C.F.R. § 550.406.

- The prohibition of services is interpreted to apply to services performed in the United States; by an entity located in the United States, including its overseas branches; or outside the United States by a U.S. person ordinarily resident in the United States.[98]
- Legal services concerning compliance with U.S. law are authorized provided payment therefor is specifically licensed.[99]

Except as authorized, no U.S. person may engage in any transaction relating to travel to Libya or to activities within Libya by any U.S. citizen or permanent resident alien.[100]

3.7.1 Exceptions

Exceptions from OFAC Libyan license requirements are as follows:

- Publications and donations, such as food, clothing, medicine, and medical supplies.[101]
- Reexports, provided that the U.S.-origin goods have been substantially transformed in third countries, except that prohibited exports include exported goods substantially transformed into products (or exported technology for products) to be used in Libya in the petroleum or petrochemical industry.[102]
- Commerce License Exceptions BAG, the U.S. Government portion of GOV, and GFT and the publicly available technology and software exception from "subject to the EAR."[103]
- Transactions for telecommunications and mail between the United States and Libya.[104]

3.7.2 Licensing Policy

Specific licenses may be issued to authorize substantially transformed reexports from third countries for the petroleum or petrochemical

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[98] 31 C.F.R. § 550.422.
[99] 31 C.F.R. § 550.517.
[100] 31 C.F.R. § 550.207.
[101] 31 C.F.R. § 550.202.
[102] 31 C.F.R. § 550.409.
[103] 31 C.F.R. § 550.504.
[104] 31 C.F.R. § 550.510.

industry in cases involving extreme hardship or where the third-country products will have insubstantial U.S. content.[105]

3.7.3 Travel

Travel and residence transactions are authorized if the U.S. citizen or permanent resident alien registers his or her eligibility in writing with either the Embassy of Belgium in Libya or the Treasury Department in Washington.[106]

3.8 SUDAN

With respect to Sudan, OFAC prohibits the following:

- Exports from the United States or, if by a U.S. person, from a foreign country.[107]
- Facilitation of export or reexport by a U.S. person, including brokering activities.[108]
- Exports from the United States to a third country intended for trans-shipment to Sudan, including intended incorporation or substantial transformation into a third country product to be used in Sudan or manufactured to fill a Sudanese order or sold predominantly to Sudan.[109]

3.8.1 Exceptions

Exceptions from Treasury Sudan controls are as follows:

- Donations to relieve human suffering, such as food, clothing, and medicine.[110]
- Personal communications not transferring anything of value.[111]
- Information or informational materials.[112]
- Transactions incident to travel.[113]

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[105] 31 C.F.R. § 550.409(c).
[106] 31 C.F.R. § 550.560.
[107] 31 C.F.R. § 538.205.
[108] 31 C.F.R. § 538.206.
[109] 31 C.F.R. § 538.441.
[110] 31 C.F.R. § 538.205.
[111] 31 C.F.R. § 538.211(a).
[112] 31 C.F.R. §§ 538.205, 538.211(b), 538.306.
[113] 31 C.F.R. § 538.211(c).

- Transactions for conduct of official business of the U.S. Government or the United Nations.[114]
- Journalistic activity.[115]
- Reexports not controlled for national security, missile, nuclear, or chemical and biological warfare reasons by non-U.S. persons of U.S.-origin items subject to license application requirements under other U.S. regulations if incorporated into another product outside the United States and constitute 10 percent or less by value of that product or substantially transformed outside the United States.[116]
- Accompanied baggage.[117]
- Receipt and transmission of telecommunications and mail.[118]
- Intellectual property.[119]
- Diplomatic pouches.[120]
- Household goods and personal effects.[121]

The exception for reexports by non-U.S. persons is an empty box, because the regulation contains no prohibition of reexports by non-U.S. persons from which this might be an exception.

3.8.2 Licensing Policy

Specific licenses may be issued to ensure the safety of civil aviation or of ocean-going maritime traffic.[122]

3.9 UNITA (ANGOLA)

OFAC prohibits the unauthorized sale by U.S. persons or from the United States to UNITA of "arms and related material of all types,

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[114] 31 C.F.R. § 538.211(d).
[115] 31 C.F.R. § 538.211(e).
[116] 31 C.F.R. § 538.507.
[117] 31 C.F.R. § 538.511.
[118] 31 C.F.R. §§ 538.512, 538.513.
[119] 31 C.F.R. § 538.514.
[120] 31 C.F.R. § 538.516.
[121] 31 C.F.R. § 538.518.
[122] 31 C.F.R. § 538.519.

including weapons and ammunition, military vehicles and equipment and spare parts, and petroleum and petroleum products."[123]

The term "arms and related material" includes, in addition to items on the U.S. Munitions List, the following items on the Commerce Control List:[124]

- Spindle assemblies ECCN 2B998.a.
- Equipment for the production of military explosives and solid propellants ECCN 1B018.
- Equipment for the manufacture of arms ECCNs 2B018 and 0B986.
- Construction equipment built to military specifications, specially designed for airborne transport ECCN 0A018.b.
- Vehicles specially designed for military purposes ECCN 9A018.b.
- Pressure refuellers ECCN 9A018.c.
- Specifically designed components and parts for ammunition ECCN 0A018.c.
- Non-military shotguns ECCN 0A984.
- Shotgun shells and parts ECCN 0A986.
- Military parachutes ECCN 9A018.e.
- Submarine and torpedo nets ECCN 8A018.b.5.
- Bayonets and muzzle-loading (black powder) firearms ECCN 0A018.d and .e.
- Aircraft ECCNs 9A018.a and 9A991.a, b.
- Aircraft components ECCNs 6A008, 6A108, 6A998, 7A001-7A006, 7A101-7A106, 7A994, 9A001, 9A003, 9A101, and 9A991.c-e.

3.9.1 Exceptions

Although the regulations define "general license,"[125] no such license has been authorized. Any future regulation, ruling, instruction, or license authorizing any transaction otherwise prohibited will

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[123] Exec. Order No. 12,865 and 31 C.F.R. § 590.201.
[124] 31 C.F.R. § 590 App. A and Exec. Order No. 13,069.
[125] 31 C.F.R. § 590.303.

remove the prohibition only to the extent specifically stated by its terms.[126]

3.9.2 Licensing Policy

The Regulations do not state criteria for issuing or denying a license application. No license shall be deemed to authorize any transaction effected prior to the issuance of the license, unless specifically provided in such license.[127]

3.10 YUGOSLAVIA

OFAC generally prohibits the export or reexport of any goods, software, or technology from the United States, or by a U.S. person wherever located and regardless of country of origin of the item, to the Federal Republic of Yugoslavia (Serbia and Montenegro) (FRY(S&M)) or to an entity of the Government of FRY(S&M) or the Government of Serbia wherever located.[128]

3.10.1 Exceptions

OFAC FRY(S&M) export restrictions do not apply generally to the Republic of Montenegro[129] nor to the Serbian province of Kosovo;[130] but these restrictions do apply to FRY(S&M) or Serbian Government entities located in Montenegro or Kosovo.

3.10.2 Licensing Policy

Specific licenses may be issued relating to the humanitarian needs of civilians and regarding the commercial sale of agricultural commodities and products, medicine, and medical equipment for civilian end use.

3.11 TALIBAN

OFAC generally prohibits the export or reexport of any goods, software, or technology from the United States, or by a U.S. person

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[126] 31 C.F.R. § 590.501(c).
[127] 31 C.F.R. § 590.501(a).
[128] 31 C.F.R. § 586.
[129] 31 C.F.R. § 586.516.
[130] Exec. Orders No. 13,088 and 13,121.

wherever located, to the territory of Afghanistan controlled by the Taliban or to the Taliban.[131]

As of May 1, 2000, OFAC had not issued regulations to implement this Order. The Order directs that commercial sales of agricultural commodities and products, medicine, and medical equipment for civilian end use be authorized under safeguards to prevent diversion to military, paramilitary, or terrorist end users or end use or to political end use. It is not known whether this directive will be carried out through an exception from the restrictions or through licensing policy.

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[131] July 6, 1999, Executive Order, amended July 22 to include the city of Kabul in "territory of Afghanistan controlled by the Taliban."

TABLE 3-1

Checklist of Information for Proposed Transaction by a U.S.-Owned or Controlled Foreign Firm Pursuant to Section 515.559 of the Cuban Assets Control Regulations

A. Transaction Involving Export to Cuba from a Foreign Country:

1. Applications must always be submitted by the U.S. parent company on behalf of the U.S.-owned or controlled foreign firm. The applications should be submitted in duplicate to the Foreign Assets Control Division, Federal Reserve Bank of New York, 33 Liberty Street, New York, New York 10045. Application forms, TFAC-5, (renumbered 90-22.8) can be obtained from the same office.
2. Identify each owned or controlled foreign firm participating in the transaction and its specific role; supply information regarding management structure for each (see items 15, 16).
3. Identify all intermediary parties to the transaction.
4. Advise whether the foreign country where the firm is located either by law requires or by policy favors trade with Cuba.
5. Identify the ultimate purchaser in Cuba.
6. Identify the commodity to be exported, including quantity involved in the transaction and the total value, expressed in U.S. dollars. If the commodity is not readily identifiable by its name, briefly describe its purpose and end use.
7. State whether the commodity to be exported is non-strategic.
8. Advise whether any U.S.-origin technical data will be transferred to Cuba as part of the transaction.
9. Advise whether any U.S.-origin raw materials, parts or components will be transferred to Cuba as part of the transaction. If so, supply the percentage of the U.S. content by the foreign market value.
   Note: Authorization must be obtained from the Department of Commerce, Bureau of Export Administration, if U.S. content is involved. If more than 20 percent U.S. content is involved, the applicant must obtain Commerce Department authorization before requesting a license from the Treasury Department.
10. Advise whether any U.S.-origin spare parts will be exported.
    Note: If such parts are involved, Commerce Department authorization is required.
11. Advise whether any U.S. dollar accounts will be used at any stage of the transaction, e.g., to purchase raw materials or pay wages.

TABLE 3-1 (CONTINUED)

12. State the terms of payment and currency to be used.
13. Advise whether the owned or controlled foreign firm has a firm order or has signed a qualified contract in connection with the proposed sale.
    Note: The contract should not be signed unless it contains a provision stipulating that the contract is subject to the licensing requirements of the Cuban Assets Control Regulations or a provision allowing the foreign firm to cancel the contract in the event a Treasury Department license is not granted.
14. State the time period during which goods will be shipped.
    Note: Licenses will not be valid for more than one year and are usually valid for only six months. In appropriate cases, extensions may be granted in response to requests by applicant.
15. For each foreign firm involved in a transaction supply the following information:
    a) In the conduct of the type of business for which a license is requested, is the foreign firm generally independent of the U.S. parent company in such areas as decision-making, risk-taking, negotiation, financing or arranging of financing, and performance?
    b) Total number of officers and directors of foreign firm. Identify by position(s) any officer or director who is also an officer or director of a person within the United States.[1]
16. If a transaction (or transactions) involving the same foreign firm has been licensed by the Treasury Department within the past two years, give date and number of the most recent license.
17. State whether any person subject to U.S. jurisdiction traveled to Cuba in connection with the transaction for which a license is sought or in connection with any other transaction involving Cuba.
    Note: Effective May 15, 1982, no person subject to U.S. jurisdiction (which includes U.S. citizens living abroad) may engage in transactions relating to travel to Cuba for business purposes unless a specific license has been obtained from the Treasury Department. Generally speaking, licenses will not be granted for transactions relating to such travel.[2]

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[1] As defined in 31 C.F.R. § 515.330.
[2] See 31 C.F.R. § 515.560.

TABLE 3-1 (CONTINUED)

B. Transaction Involving Import from Cuba to a Foreign Firm:

1-6. Provide the same information as requested for items 1, 2, 4, 15, 16 and 17 in part A above.
7. Identify commodity to be purchased.
8. Advise total quantity and value, expressed in dollars, of commodity.
9. Advise ultimate disposition of commodity.
10. Advise payment terms.
11. Advise whether any U.S. dollar accounts will be involved.
12. Advise date(s) of purchase.

Note: Licenses are not valid for more than one year and are usually valid for only six months. In appropriate cases, extensions may be granted in response to requests by applicants.

Chapter 4:
Commerce BXA Controls

CHAPTER 4

COMMERCE BXA CONTROLS

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4.1 SCOPE AND OBJECTIVES

The Department of Commerce Bureau of Export Administration (BXA) administers all export controls not administered by another agency. BXA controls are divided into three types: national security, foreign policy, and short supply.

National security controls were established after World War II, because of Cold War considerations. A multilateral organization, called COCOM, coordinated the national security controls of Allied nations. Following the breakup of the Soviet Union, COCOM was disbanded in 1994. Nevertheless, former COCOM members and many newly cooperating countries, including Russia itself, coordinate controls in a new organization called the Wassenaar Arrangement. The Wassenaar Munitions List (WML) and the Wassenaar Dual-Use List (WDUL) closely parallel the old COCOM International Munitions List (IML) and COCOM Industrial List (IL).

So-called foreign policy controls cover:

- Virtually total embargoes of North Korea, Cuba, Libya, Iran, Iraq, Serbia excluding Kosovo, Sudan, and Taliban-controlled areas of Afghanistan, administered jointly by Treasury and Commerce.
- Virtually all those items on the Commerce Control List that are technically described to Syria for anti-terrorism reasons.
- Nuclear proliferation, missile, and chemical and biological items, largely as agreed in separate multilateral organizations concerned with these weapons of mass destruction but also including "catch-all" controls and other activities by U.S. persons.
- Specified security items to non-Allied countries for regional stability reasons.
- Arms-related items to Rwanda or Serbias and Montenegro.
- Crime control items controlled for human rights reasons.

Short supply controls apply to various petroleum items, western red cedar, and shipments of horses by sea.

The distinction between national security and foreign policy controls is somewhat arbitrary. It is based on the different authorities in the Export Administration Act (EAA) of 1979, as amended. The

EAA expired in 1994. In spasmodic efforts to revive it since then, some consideration has been given to discontinuing the distinction.

This chapter describes export controls administered by BXA for national security, foreign policy, and short supply reasons as described in sections 5, 6, and 7 of the EAA.[1]

The objectives of these controls are spelled out primarily in policy statements appearing in section 3 of the EAA. These date from the Cold War. They were not revised when the EAA was temporarily revived in March 1993, nor when it was briefly renewed on June 30, 1994. The EAA expired on August 20, 1994; but an Executive Order states that the controls, which continue under authority of the International Emergency Economic Powers Act (IEEPA), are to be carried out under the provisions of the EAA "to the extent permitted by law."[2]

In effect, the EAA says that controls should be used only as a last resort and, even then, only when necessary to further fundamental objectives. Nevertheless, it is at least open to question whether many of the controls currently in effect are indeed necessary to further current fundamental objectives.

4.1.1 Basic Policies

EAA section 5 authorized security controls to carry out the policy set forth in section 3(2)(A); EAA section 6 authorized foreign policy controls to carry out the policies set forth in EAA sections 3(2)(B), (7), (8), or (13); and EAA section 7

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[1] The following aspects of these controls are referred to in other chapters:

- Overlapping jurisdiction between Commerce controls and those of other agencies in sections 1.2.1.5, 1.2.3.2, 1.2.4.3, 1.2.5.2, 1.2.6, 1.2.7, 1.2.8, and 1.2.9 in Chapter 1.
- Transaction types controlled by BXA and jurisdiction exercised and not exercised by BXA in Tables 1-3, 1-4, and 1-5 and sections 1.4.1 and 1.4.2 in Chapter 1.
- BXA-related steps 1, 2(c), 3(a), 4, 5, 7, 9, 14, 15, 16, and 17 in a Decision Tree to Determine Agency Jurisdiction in Table 1-6 in Chapter 1.
- Administration of BXA controls in Chapter 6.
- Enforcement of BXA controls in Chapter 8.

For BXA controls imposed for other reasons, see Chapter 7 on anti-boycott restrictions.

[2] Exec. Order No. 12,924, 59 Fed. Reg. 43,437 (Aug. 19, 1994).

authorized short supply controls to carry out the policy set forth in section 3(2)(C). These policy statements are as follows:

> (2) It is the policy of the United States to use export controls only after full consideration of the impact on the economy of the United States and only to the extent necessary—
>
> (A) to restrict the export of goods and technology which would make a significant contribution to the military potential of any other country or combination of countries which would prove detrimental to the national security of the United States;
>
> (B) to restrict the export of goods and technology where necessary to further significantly the foreign policy of the United States or to fulfill its declared international obligations;
>
> (C) to restrict the export of goods where necessary to protect the domestic economy from the excessive drain of scarce materials and to reduce the serious inflationary impact of foreign demand.
>
> (7) It is the policy of the United States to use export controls, including license fees, to secure the removal by foreign countries of restrictions on access to supplies where such restrictions have or may have a serious domestic inflationary impact, have caused or may cause a serious domestic shortage, or have been imposed for purposes of influencing the foreign policy of the United States. In effecting this policy, the President shall make reasonable and prompt efforts to secure the removal or reduction of such restrictions, policies, or actions through international cooperation and agreement before imposing export controls. No action taken in fulfillment of the policy set forth in this paragraph shall apply to the export of medicine or medical supplies.
>
> (8) It is the policy of the United States to use export controls to encourage other countries to take immediate steps to prevent the use of their territories or resources to aid, encourage, or give sanctuary to those persons involved in directing, supporting, or participating in acts of international terrorism. To achieve this objective, the President shall make reasonable and prompt efforts to secure the removal or reduction of such assistance to international terrorists through international cooperation and agreement before imposing export controls.
>
> (13) It is the policy of the United States to control the export of goods and substances banned or severely restricted for use in

> the United States in order to foster public health and safety and to prevent injury to the foreign policy of the United States as well as to the credibility of the United States as a responsible trading partner.

Sections 3(2)(A) and (B) constitute the basic purposes of national security and foreign policy controls, respectively. National security is, of course, a primary foreign policy objective. However, as the terms are used for export control purposes, "foreign policy" excludes "national security." In earlier versions of this authority, national security controls were authorized if the item would make a significant contribution to the "economic" as well as the "military" potential of another country that would be detrimental to U.S. national security. The word "economic" was dropped in 1972, thus making it clear that national security controls are not designed for economic warfare purposes.

Section 3(7) states not only a foreign policy basis but also a short supply basis for imposing export controls, namely, to persuade other countries to remove their short supply or foreign-policy controls. The United States is not now imposing controls for this reason. Indeed, no foreign controls that might occasion consideration of such reactive U.S. controls have been identified. The Arab boycott of Israel is not so regarded. U.S. reaction to that boycott is to insist on non-compliance with the foreign restrictions rather than to impose U.S. export restrictions.[3]

Section 3(8) provided the statutory basis for export controls designed to discourage terrorism. The original targets of these controls were some of the same Arab countries which were boycotting Israel. However, the basis for U.S. export control is terrorist activity rather than boycott activity. Moreover, the terrorism controls now apply also to the non-Arab countries of Cuba, North Korea, Iran, and Sudan as well as the Arab countries of Libya, Syria, and Iraq.[4]

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[3] See EAA section 3(6), quoted below in section 4.1.2.1, and Chapter 7 on Commerce anti-boycott restrictions.

[4] Iraq was removed from the list in 1982 but put back on the list September 1, 1990. On August 18, 1993, the State Department added Sudan to the list. A May 23, 1997, Federal Register notice included Afghanistan on a list of terrorist supporting countries; but Commerce regulations do not include Afghanistan in this category. However, a July 6, 1999, Executive Order imposed an embargo on exports to Taliban-controlled areas of Afghanistan.

4.1.2 Supplementary Policies

The above-described policy statements, which provide the explicit basis for BXA national security, foreign policy, and short supply controls, are supplemented by others, which qualify them. Some of the qualifying statements apply to more than one type of controls, some apply only to national security controls; and some apply only to foreign policy controls.

4.1.2.1 General Applicability

Supplementary statements that apply generally appear in the following subsections of EAA section 3:

> (1) It is the policy of the United States to minimize uncertainties in export control policy and to encourage trade with all countries with which the United States has diplomatic or trading relations, except those countries with which such trade has been determined by the President to be against the national interest.
>
> (3) It is the policy of the United States (A) to apply any necessary controls to the maximum extent possible in cooperation with all nations.
>
> (4) It is the policy of the United States to use its economic resources and trade potential to further the sound growth and stability of its economy as well as to further its national security and foreign policy objectives.
>
> (5) It is the policy of the United States
>
> > (A) to oppose restrictive trade practices or boycotts fostered or imposed by foreign countries against other countries friendly to the United States or against any United States person;
> >
> > (B) to encourage and, in specified cases, require United States persons engaged in the export of goods or technology or other information to refuse to take actions, including furnishing information or entering into or implementing agreements, which have the effect of furthering or supporting the restrictive trade practices or boycotts fostered or imposed by any foreign country against a country friendly to the United States or against any United States person; and
> >
> > (C) to foster international cooperation and the development of international rules and institutions to assure reasonable access to world supplies.

> (10) It is the policy of the United States that export trade by United States citizens be given a high priority and not be controlled except when such controls (A) are necessary to further fundamental national security, foreign policy, or short supply objectives, (B) will clearly further such objectives, . . .
>
> (12) It is the policy of the United States to sustain vigorous scientific enterprise. To do so involves sustaining the ability of scientists and other scholars freely to communicate research findings, in accordance with the applicable provisions of law, by means of publication, teaching, conferences, and other forms of scholarly exchange.
>
> (14) It is the policy of the United States to cooperate with countries which are allies of the United States and countries which share common strategic objectives with the United States in minimizing dependence on imports of energy and other critical resources from potential adversaries and in developing alternative supplies of such resources in order to minimize strategic threats posed by excessive hard currency earnings derived from such resource exports by countries with policies adverse to the security interests of the United States.
>
> (15) It is the policy of the United States, particularly in light of the Soviet massacre of innocent men, women, and children aboard Korean Air Lines Flight 7, to continue to object to exceptions of the International Control List of the Union of Soviet Socialist Republics, subject to periodic review by the President.[5]

All of these qualifications, except EAA sections 3(14) and 3(15), reflect desires to avoid adverse consequences of controls. But they are all merely hortatory. They are sometimes cited as supporting arguments in complaints against specific controls. However, they are themselves insufficiently specific to have much effect in lessening controls on individual items, and are even less effective in persuading decision-makers to eliminate broad categories of controls.

For example, section 3(1) would appear to prohibit controls except on trade with countries for which the President has determined that trade is against the national interest. However, many

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[5] An administration proposal to remove Cold War relics from legislation, submitted to the Congress July 9, 1993, would have removed section 3(15) but not 3(14), which was also prompted by the Cold War (the frustrated U.S. effort to stop a gas pipeline from the USSR to Western Europe in the wake of imposition of martial law in Poland in 1981).

aspects of national security controls apply to exports to friendly countries. Moreover, foreign policy controls for human rights and for nuclear, chemical and biological warfare (CBW), and missile non-proliferation purposes apply to many more countries than those for which there are significant concerns in these areas, even including U.S. allies.

With respect to section 3(3), there is some cooperation with other countries on national security controls;[6] on Iraq and Serbia; and on some parts of nuclear, chemical and biological, and missile non-proliferation foreign policy controls.[7] However, there is very little, if any, cooperation with other countries on foreign policy selective controls concerning human rights, terrorism, or regional stability or on foreign policy embargoes of North Korea, Cuba, Libya, Iran, Sudan, and Taliban-controlled areas of Afghanistan.

Section 3(12) was motivated by controls on unclassified information regarded as being "sensitive." Complaints led not only to this legislation but also to a Presidential directive that seemed to require that classification be the only acceptable means of restricting the dissemination of information developed under government contract. However, a law passed in 1983 limited access under the Freedom of Information Act by authorizing the Department of Defense to withhold from public disclosure information subject to export controls that the agency possessed or controlled.[8]

Section 3(14) constituted statutory support provided in 1985 for a control imposed by the Administration in 1981 and removed in 1982 on equipment and technology for a pipeline to deliver natural gas from the Soviet Union to Western Europe. This was a foreign policy control in reaction to Soviet pressure that resulted in Polish imposition of martial law because of activities of the Solidarity workers' movement. The statute stated a security justification for such a control. There are now no controls related to this policy statement.[9]

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[6] The so-called Wassenaar arrangement.

[7] The so-called Nuclear Suppliers Group, Australia Group, and Missile Technology Control Regime.

[8] 10 U.S.C. § 140c.

[9] Not only were the 1981 transmission and refining controls removed in 1982, but the 1978 controls on export to the Soviet Union of oil and gas exploration and production equipment and technology were removed in 1987.

Section 3(15) referred to a policy, initiated in 1980, by administrative rather than statutory action, to stop approving exceptions to the COCOM embargo on the export of strategic items to the Soviet Union in reaction to that country's invasion of Afghanistan. This so-called "no-exceptions" policy was, thus, imposed as a foreign policy action. However, it affected transactions controlled for national security reasons. Nine years later, in 1989, the no-exceptions policy was lifted, once again by administrative rather than statutory action, after the Soviet Union had completed its withdrawal of troops from Afghanistan.

4.1.2.2 Security Only

The supplementary statements that apply only to security controls appear in the following subsections of EAA section 3:

> (3) It is the policy of the United States . . .
>
> (B) to encourage observance of a uniform export control policy by all nations with which the United States has defense treaty commitments or common strategic objectives.
>
> (9) It is the policy of the United States to cooperate with other countries with which the United States has defense treaty commitments or common strategic objectives in restricting the export of goods and technology which would make a significant contribution to the military potential of any country or combination of countries which would prove detrimental to the security of the United States and of those countries with which the United States has defense treaty commitments or common strategic objectives, and to encourage other friendly countries to cooperate in restricting the sale of goods and technology that can harm the security of the United States.

The Mutual Defense Assistance Control Act of 1951 (the so-called Battle Act) conditioned U.S. foreign aid on cooperation from aid recipients in controlling strategic exports. The Battle Act was eventually repealed, because countries with the capability to produce and export strategic items had long since ceased being recipients of U.S. aid. However, these EAA statements retained the Battle Act underlying policy of multilateral cooperation in the administration of security export controls. The principal form this cooperation took was COCOM, the organization of NATO members less Iceland plus

Japan and Australia, which coordinated the strategic export controls of its members. The Battle Act authority for U.S. participation in COCOM was retained as EAA section 5(k).

The strategic criteria on which COCOM based its deliberations in agreeing on an embargo list were thus relevant to the objectives of U.S. national security controls. The COCOM strategic criteria were as follows:[10]

> The purpose of the embargo is to restrict the export of only those goods and technologies conforming with the three strategic criteria, provided they are such as to make a significant contribution to the military potential of proscribed destinations and thus have an adverse effect on the security of the member states.
>
> (a) Materials, equipment and technologies which are designed specially or in peacetime used principally for the development, production, or utilization of modern arms, ammunition or implements of war.
>
> (b) Materials and equipment incorporating unique technological know-how, the acquisition of which by proscribed destinations may give significant direct assistance to the development and production in peacetime of modern arms, ammunition or implements of war, of their means of use or delivery, or of countermeasures to them.
>
> (c) Materials, equipment and technologies, of which proscribed destinations have a deficiency which may reasonably be expected to be critical in relation to the production in peacetime of modern arms, ammunition or implements of war, of their means of utilization or delivery, or of counter-measures to them, and which they could not overcome within a reasonable period.

The introduction to the COCOM criteria went a step beyond the EAA authority for security controls by declaring that a significant contribution to the military potential of proscribed destinations would have an adverse effect on the security of the member states. This contrasted with EAA section 3(2)(A), which authorized restrictions only if the significant contribution to the military potential of any country is judged to be detrimental to U.S. security. However, COCOM-permitted exceptions

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[10] OCR International Inc., Multilateral (COCOM) Security Export Control Lists as of September 1, 1990, p. 225.

from the embargo under procedures containing several general principles, one of which was, substantially, political factors affecting the security of member countries.

Under both U.S. law and COCOM procedures, therefore, it was possible to approve, on an exceptional basis, exports which would make a significant contribution to the military potential of COCOM-proscribed destinations, which were, when COCOM dissolved on March 31, 1994, the former USSR, Bulgaria, Romania, People's Republic of China, North Korea, and Vietnam. Such exports had been approved from time to time to the People's Republic of China prior to the Tiananmen Square events in 1989.

From 1958 until the disbanding of COCOM, the three criteria were all related to the development, production, or use of arms. Thus COCOM moved away from economic warfare before the United States did. However, the relationship of these criteria to arms could, at least in practice, be remote. Take, for example, computers, microelectronics, and lasers. The COCOM embargo probably had a greater effect on trade in these items than on trade in any other COCOM-listed items. Yet, their relationship to arms is quite indirect. These items were designed originally for civil purposes and their use is principally civil. Therefore, criterion (a) did not apply. They do incorporate unique technological know-how; but experts generally question the practicality of reverse-engineering. Therefore, the applicability of criterion (b) was in doubt. This left criterion (c). Former-COCOM-proscribed destinations were behind the West in at least some aspects of these technologies. Moreover, they could be critical in some military applications. However, given Russian nuclear capabilities plus the usual Russian preference to rely only on proven, indigenous technology for deployed weapons, the Russians may not have regarded their deficiencies as militarily critical to them. It was not argued that such items must be controlled because of economic warfare considerations. But the military justification for control was based more on better-be-safe-than-sorry reasoning than on clear conformity with strategic criteria. During the Cold War, there was much to be said for better-be-safe-than-sorry arguments, so this does not mean that the controls were without justification. But it helped to put the control system into perspective to realize that the objectives of security controls seemed to boil down to essentially that.

With the demise of COCOM on March 31, 1994, the former members agreed to control items on the COCOM lists until a

successor organization was established. The successor organization eventually established is called the Wassenaar arrangement. Wassenaar membership has expanded[11] and now even includes eight countries formerly proscribed by COCOM.[12] Nevertheless, Wassenaar-approved lists differ only slightly from the old COCOM lists. However, Wassenaar differs from COCOM in several important respects. Wassenaar has adopted neither the COCOM strategic criteria nor any variant thereof. Wassenaar has agreed on no list of proscribed countries. Wassenaar does not subject proposed exports to the rule of unanimity, as COCOM did until the last few years of its existence.

4.1.2.3 Foreign Policy Only

The following subsection of EAA section 3 supplemented the policy statements which explicitly authorize foreign policy controls:

> (11) It is the policy of the United States to minimize restrictions on the export of agricultural commodities and products.

Section 3(11) was a reaction to the grain embargo on exports to the Soviet Union that President Carter imposed in response to the 1979 invasion of Afghanistan and President Reagan lifted shortly after coming into office in 1981. Moreover, agricultural commodities were excepted from comprehensive controls on exports to Libya imposed in 1986 and specified agricultural commodities were excepted from the embargo that was, for a short time, imposed on Haiti.[13]

4.1.3 Human Rights

There is a statutory requirement to control the export of crime control equipment to countries that consistently violate

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[11] 15 C.F.R. § 743 Supplement 1 contains a list of all Wassenaar member countries.

[12] Russia, Ukraine, Bulgaria, Czech Republic, Slovakia, Hungary, Poland, and Romania.

[13] Other embargoes require licenses for agricultural products, although a liberal licensing policy is in effect to non-governmental entities in Cuba, for humanitarian donations to Iraq, to relieve human suffering in Sudan, and for commercial sales to Serbia and Taliban-controlled areas of Afghanistan.

internationally recognized human rights.[14] No country has been publicly designated as such a consistent human rights violator. However, a license is required for the export of crime control equipment to all destinations except NATO countries, Japan, Australia, and New Zealand.[15] These controls are being used to deter violations and to distance the United States from them.[16]

China sanctions legislation requires suspension of issuance of any licenses for export to the People's Republic of China of crime control and detection instruments and equipment unless the President reports to Congress progress on political reform or a national interest determination to terminate the suspension.[17]

Instruments of torture require a license to all destinations.[18]

4.1.4 China Nuclear Sanctions

China sanctions legislation also requires suspension of licenses under the EAA for export to the People's Republic of China of items for use in a nuclear production or utilization facility of significance for nuclear explosive purposes until the President not only reports to Congress, as for crime control equipment, but also certifies Chinese non-assistance to nuclear weapons proliferation and makes a certification.[19] Such nuclear non-proliferation controls are considered to be both security and foreign policy.

4.2 LICENSE REQUIREMENTS

Basically, BXA controls everything that is not otherwise controlled by other agencies. A complete, detailed alphabetical index of items on the Commerce Control List is at Appendix 4-1.[20]

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[14] Section 502B of the Foreign Assistance Act of 1961.

[15] Pursuant to EAA section 6(n), which cites section 502B.

[16] 15 C.F.R. § 742.7.

[17] Pub. L. No. 101-246, § 902(a)(4), 22 U.S.C. § 2151 (note) (Feb. 16, 1990).

[18] 15 C.F.R. § 742.11 and 15 C.F.R. § 774 Supplement 1 ECCN 0A983.

[19] Pub. L. No. 99-183, § 902(a)(6)(A)(i).

[20] See Chapter 1 for what other agencies control. See Chapters 1 and 2 for what is exempted from control by the Department of State and apparently not picked up for control by BXA. Also see section 1.4.1 in Chapter 1 for those few types of transactions that are under Commerce jurisdiction but Commerce has decided not to control. However, BXA employs a regulatory mechanism flexible enough to permit distinctions in the degree of control imposed on different countries or on different commodities, software, or technology.

BXA controls are described in the definition of "subject to the EAR"[21] and in ten General Prohibitions.[22] Three of the Prohibitions relate to enforcement.[23] Of the other seven, two are what one normally expects in an export control regime, namely, Prohibition One controls defined items from the United States exported or reexported to defined countries and Prohibition Six controls virtually everything "subject to the EAR" to embargoed countries. The remaining five prohibitions are substantially as follows:

1. Prohibition Two covers exports from foreign countries of U.S. content in foreign-made items.
2. Prohibition Three covers exports from foreign countries of foreign-made items based on U.S. technology.
3. Prohibition Five covers any item to defined end-users or end-uses.
4. Prohibition Seven prohibits specified activities of U.S. persons.
5. Prohibition Eight requires a license for exports transiting a country formerly proscribed by COCOM if the item would require a license to the country transited, even if it would not require a license to the country of final destination.

In the interest of national security and despite the demise of COCOM, there are still broader and tighter controls to former-COCOM-proscribed destinations than to other countries. East Germany, Hungary, Poland, Czech Republic, and Slovakia were removed from the list of COCOM-proscribed, and security control proscribed, destinations before COCOM was disbanded. But the final list of COCOM-proscribed countries is retained in the BXA definition of "controlled country."[24] Prohibition Three on direct product of U.S. technology applies only to "controlled" countries.[25] "Controlled" countries are also subject to special computer restrictions applicable to Computer Tier 3.[26]

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[21] 15 C.F.R. § 734.3.

[22] 15 C.F.R. § 736.2(b).

[23] 15 C.F.R. § 736.2(b)(4, 9, and 10).

[24] 15 C.F.R. § 772 and 15 C.F.R. § 768.1(d).

[25] Country Group D:1, to which reference is made in 15 C.F.R. § 736.2(b)(3), includes only "controlled" countries. "Controlled" countries are also singled out as ineligible for many License Exceptions. References to Country Group D:1 are in many sections of 15 C.F.R. §§ 740, 744.7(b), and 748 Supplement 2.

[26] 15 C.F.R. § 740.7(d)(1).

Controls to further U.S. foreign policy are also differentiated by country.[27]

Commodities, software, or technology that are judged to be capable of contributing significantly to the military potential of the recipient are controlled more tightly than items of only marginal military use. This is the principal basis for BXA control of items marked MT, CB, or NP on the Commerce Control List. Foreign policy controls are also sometimes tailored to the commodities, software, or technology most closely associated with the behavior that motivated the restrictions, such as crime control equipment and technology for abuse of human rights.

All short supply items are controlled to all countries, including Canada. Special limitations are imposed by statute regarding export of crude oil.[28]

No license application need be filed to export most commodities, software, and technology for most end-uses and end-users in most destinations. Moreover, with only a few exceptions, a BXA license is not required for export to Canada.

Administration of controls is not an exact science. Deciding which items to control involves judgments, generally by several U.S. Government officials, often in several different agencies. Some relevant facts for making these judgments are often not known. The significance of the contribution of a product or of a technical process to military potential is a value judgment on which reasonable people may disagree. It is difficult to determine the extent to which controlled items are available outside the United States, historically a key consideration as to whether controls will be effective in denying such items to targeted countries. It is also difficult to define controlled

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[27] 15 C.F.R. § 740 Supplement 1 Country Groups D:2, D:3, and D:4 list countries subject to special missile (MT), chemical and biological (CB), or nuclear (NP) restrictions. Computer Tier 3 includes not only countries "controlled" for national security reasons but also these countries of MT, CB, or NP concern (except Burma and Taiwan). The inclusion in Computer Tier 3 of ten countries not now otherwise subject to any special restrictions, namely, Algeria, Andorra, Angola, Bosnia and Herzegovina, Comoros, Croatia, Djibouti, Morocco, Tunisia, and Vanuatu, may be a temporary aberration. In the recent past most of the ten had been removed from NP or other special controls. Accordingly, they may be candidates for removal from Computer Tier 3.

[28] 15 C.F.R. § 754.2(a, b, c).

items so that all affected parties have the same understanding as to precisely what requires a license.

Moreover, the world is not static. Military needs change. Degree of availability changes. Political developments abroad and changing domestic policies may revise the government's attitude toward individual items or alter a broad control philosophy. Technological advances may render past control judgments or the definitions of controlled items obsolete. The business community understandably desires predictability in controls in order to formulate sound marketing strategies. But predictability is, more often than not, difficult to achieve.

Complicating these administrative problems are statutory obligations and the frequent desirability to consult other U.S. Government agencies and foreign governments before making control decisions. The problem is compounded enormously by the participation of many agencies and foreign governments in the inherently difficult process of making control judgments.

The difficulty is evident in preparing and acting upon proposals to revise lists of items agreed upon by multilateral organizations. Review by the Departments of Commerce, State, Defense, and Energy is necessary. Insights on prospective end-uses and on the state-of-the-art in countries of concern respecting the item in question are requested from intelligence agencies. Differences of views within the U.S. Government regarding the facts, relevant intelligence, and proper listing action must then be reconciled. Even then, the process is not over, because differences of opinion among cooperating governments must also be reconciled.

4.2.1 National Security

BXA asserts control, and identifies National Security (NS) as the reason for control on the Commerce Control List (CCL), for all items on the Wassenaar Dual-Use List (WDUL) except a few items that Wassenaar considers dual-use but that the United States controls as munitions on the U.S. Munitions List (USML), which is subject to State jurisdiction.[29] Commerce and State both assert jurisdiction

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[29] See Appendix 4-2 for revisions in items on the Commerce Control List (CCL) necessary to conform in fact with Wassenaar-listed items on which those CCL items are nominally based.

over many items.[30] Those WDUL items which Commerce concedes are on the USML are, nevertheless, listed on the CCL, where they are annotated as being subject to State jurisdiction. Commerce lists these State items so that the CCL will be as close as possible to the European Union (EU) list of dual-use items. Export Control Classification Numbers (ECCNs) on the CCL with a first digit 1 through 9, a third digit 0, and fourth and fifth digits 01 through 12 are intended to correspond with similarly numbered items on the WDUL, except that Wassenaar omits the third digit.

Commerce also controls as NS a few items that are on the WML but not on the USML. These ECCNs have a first digit 0 through 9 and third, fourth, and fifth digits 018. Several xx018 ECCNs are not, in fact, on either the WML or the USML.

All NS ECCNs on the CCL are given numbers indicating that they are on one of the Wassenaar Lists. Therefore, any unilateral U.S. NS coverage is apparently unintentional. Nevertheless, unilateral control may be caused by differences between U.S. and Wassenaar texts or between the manner in which the United States and other Wassenaar member countries exercise the national discretion permitted under Wassenaar procedures.

Principal differences between U.S. and Wassenaar texts are as follows:[31]

- There are no Wassenaar items (or sub-items) corresponding to ECCNs 0A018.a, d, e searchlights, bayonets, muzzle-loading firearms; 1C018 various propellants; and 8A018.b.4 marine boilers.
- There are major differences between WML 18 equipment and technology for munitions production and the corresponding ECCNs 1B018, 2B018, and 2E018.[32]
- The following ECCNs corresponding to WDUL items on the USML are misleading, because they omit WDUL sub-item detail:1A004 protective equipment; 7A005 global positioning

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[30] See Appendices 1-2 and 1-3.

[31] For a more complete description of such differences, see Appendices 1-3 and 4-2.

[32] See section 4.2.4.1 *infra*.

satellite equipment; 7A007 direction finding equipment; 9A006-9A010 rocket propulsion systems.[33]

Legal authority for BXA to impose unilateral security controls in the absence of a finding of no foreign availability is questionable.[34] There is now no CCL item identified as being controlled unilaterally for security purposes. However, coverage in Commerce National Security items that is not in fact on a Wassenaar List constitutes unilateral control even though not so identified.

4.2.1.1 Multilateral List Revisions

Multilateral security controls historically remained relatively constant compared with foreign policy controls. From 1958 to 1990, COCOM lists were revised only by adding a few items, removing a few, and modifying a larger number. In 1990, the substantial number of items dropped were of relatively little significance. Changes in 1991 affected form more than substance. The most significant changes from 1992 to 1994 were the replacement of COCOM case review by national discretion and substantial revisions in computer controls.

Wassenaar lists do not deviate greatly from the last 1994 COCOM lists, with two exceptions:

- Wassenaar dropped entirely the COCOM International Atomic Energy List (IAEL) in order to avoid duplicating International Atomic Energy Agency (IAEA) Trigger List and Nuclear Suppliers Group (NSG) controls.
- Wassenaar added two Annexes to indicate which of the items on the WDUL were sensitive and, of those, which were very sensitive. Items listed in the Annexes are subject to more rigorous reporting requirements than other items; but licensing of even very sensitive items is subject to national discretion.

Principal revisions in Wassenaar lists since its establishment in 1996 have been:

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[33] For the missing texts, see Appendix 1-3.

[34] EAA § 5(c)(6)(A). Although the EAA expired in 1994, an Executive Order directs that it be followed to the extent permitted by law.

- Liberalization of telecommunications items, which the Commerce Control List had for years largely anticipated by granting eligibility of these items for various License Exceptions.
- Liberalization of computer and microprocessor items, because rapid technological advances for widely available items made the old limits impossible to enforce.
- Change of encryption items from a negative to a positive list.[35]

4.2.1.2 Unilateral List Revisions

The statutorily required 1989 review of unilateral security controls was the first significant review of such items in several decades. It eliminated most unilateral controls. The remaining, apparently unintentional, unilateral security controls in xx018 ECCNs, identified in section 4.2.1 above, have continued for years without much change.

4.2.1.3 Exporter Decontrol Initiative

The Export Administration Act (EAA) authorized two procedures whereby an exporter could initiate a decontrol proposal:

- Through Technical Advisory Committees (TACs).
- Through a foreign availability submission (FAS).

4.2.1.4 Technical Advisory Committees (TACs)

Technical Advisory Committees consist of technical experts from industry who are to advise the government on export control matters and to be consulted on revisions of the control list.[36] Members of the public are to be given a reasonable opportunity to present evidence to TACs. Commerce gives advance public notice of TAC meetings. The public is invited to attend most such meetings. At the beginning of each open session, the public is invited to make presentations. Such presentations are often made.

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[35] The old items covered everything except what was specifically decontrolled; whereas the new items specify what is controlled (although they also continue decontrol lists). See Chapter 5 for details.

[36] EAA §§ 5(h) and 5(c)(4).

The government's track record of heeding TAC advice is mixed. There have been complaints that the official U.S. Government position often does not reflect extensive TAC work. However, on some occasions, TAC proposals prevailed, not only in the U.S. Government but also in COCOM. TACs were especially active in the preparation of the 1991 COCOM so-called Core List. TAC representatives advised the U.S. delegation during the negotiations. TAC members have been given less opportunity to participate in Wassenaar List Reviews than had been experienced in the 1991 COCOM review.

4.2.1.5 Foreign Availability

The EAA specified criteria for a finding of foreign availability for national security controls, procedures for making foreign availability determinations, and the consequences of those determinations and required the establishment of an Office of Foreign Availability.[37] An Executive Order directs that the expired EAA be followed to the extent permitted by law and BXA foreign availability regulations continue unchanged.[38] However, these foreign availability provisions are now largely a dead letter and the Office of Foreign Availability no longer exists. This is, no doubt, largely because substantial activity in the 1980s and early 1990s produced only meager results.

The following foreign availability determinations under these statutory and regulatory provisions appear to have some current relevance:

- NMR spectrometers were decontrolled only to Western destinations on January 6, 1987, and are currently controlled by ECCN 3A233.
- Mercury-cadmium-tellurium (HgCdTe) lasers were decontrolled to Eastern destinations on April 27, 1987. HgCdTe raw material is currently controlled by ECCN 6C002.b.
- Marine water tube boilers were decontrolled only to Western destinations on January 23, 1988, and are currently controlled by ECCN 8A018.b.4.

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[37] EAA § 5(f).
[38] 15 C.F.R. § 768.

- Nd:YAG lasers were decontrolled only to Western destinations on May 11, 1988, and are currently controlled by ECCNs 6A005.c.2.a and 6A995.c.2.
- A positive determination of foreign availability for horizontally operated, side-looking or forward-looking sonar systems designed for depths greater than 1000 meters having "certain" characteristics was announced on January 18, 1991. ECCN 6A001.a.1.b.6 now controls sonar systems designed for depths greater than 1000 meters having characteristics which may, or may not, be the same as the "certain" characteristics unspecified in the 1991 announcement.
- A positive determination of foreign availability for gallium arsenide was announced on March 20, 1991. ECCN 3C001.c now covers gallium arsenide.
- A positive determination of foreign availability for hovercraft was announced on May 4, 1992. Current ECCN 8A001.f and g specifications are based on this 1992 assessment. However, U.S. Munitions List Category VIII(g) is susceptible to an interpretation that it overlaps 8A001.f and g.
- A positive determination of foreign availability for hydroxyl-terminated polybutadiene (HTPB) below the specifications on the COCOM International Munitions List (IML) was announced on June 10, 1992. The IML specifications continue in the Wassenaar Munitions List and are similar to those in the U.S. Munitions List.[39] ECCN 1C111.b.2 now covers all HTPB other than that controlled by the U.S. Munitions List.

4.2.2 Foreign Policy Items

All items under Commerce jurisdiction are controlled to some destinations for foreign policy reasons. Virtually total embargoes apply to exports to North Korea, Cuba, Libya, and Serbia. Treasury administers most aspects of the Iraq, Iran, Sudan, and Taliban-controlled areas of Afghanistan total embargoes and the UNITA (Angola) selective embargo, controls on exports (but not on reexports to Libya), and controls on exports by U.S. persons from foreign

[39] 22 C.F.R. § 121.12(a)(34).

countries of non-U.S.-origin items to North Korea, Cuba, Libya, and Serbia.[40]

Other categories of foreign policy controls now in effect are selective, with respect to both the countries of destination and the items controlled. The destinations and items controlled under each of the ten categories of foreign policy controls Commerce administers are summarized in Table 4-1. For more refinement, see section 4.4 below.

4.2.2.1 Revisions

All foreign policy controls expire after one year unless extended (EAA section 6(a)(3)). The most recent extension was for the period January 21, 2000, to January 20, 2001. Revisions are seldom made in connection with the annual extensions. Nevertheless, some foreign policy controls have changed drastically and frequently:

- Comprehensive controls on exports to Iran were imposed during the Embassy hostage crisis in 1979, removed when those hostages were returned in 1981, partially reimposed in 1987, strengthened further in 1991 and 1992, and expanded to a virtual total embargo in 1995.
- Controls on export to the USSR of oil and gas equipment and technical data were imposed in 1978, substantially expanded in 1981, returned to the 1978 level in 1982, and completely removed in 1987.
- Truck manufacturing controls to the USSR were imposed in 1978 and removed in 1990.
- Comprehensive controls on exports to Serbia excluding Kosovo were imposed in May 1999.
- On February 28, 1989, biological agents (ECCNs 4997B and 4998B) and some chemicals (ECCN 5799C) were changed from security to foreign policy control and some cameras (ECCN 4585B), some tubes (ECCN 4635B), and helium-3 (ECCN 4721B) were changed from security to nuclear non-proliferation controls. These ECCNs were removed from security

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[40] See Chapter 3.

controls because of the EAA section 5(c)(6) requirement to decontrol unilateral security items absent a determination of no foreign availability. However, existing U.S. chemical and biological controls conform closely with multilateral Australia Group Agreements.[41]

- Most, but not all, nuclear and missile controls also conform with multilateral agreements, which are revised periodically.[42]

On the other hand, some foreign policy controls remain in place a long time with no change. The continuing embargoes of North Korea and Cuba were imposed several decades ago.

4.2.2.2 Foreign Availability

In 1979, the EAA was amended to require "feasible steps" to negotiate away foreign availability for items controlled for foreign policy purposes.[43] However, no such steps have ever been taken. There have been no foreign availability determinations for foreign policy controls, even though foreign availability clearly exists. Annual reports extending foreign policy controls concede foreign availability for most of them.

The foreign availability regulations,[44] including even the regulatory description of "Foreign Availability,"[45] are limited to national security controls.

4.2.2.3 Enhanced Proliferation Control Initiative

Foreign policy controls affect not only defined entries on the CCL but also all other "catch-all" items and "certain activities of U.S. persons." These additional controls are called the Enhanced Proliferation Control Initiative, or EPCI. They are now embodied in

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[41] See Appendix 4-5 for revisions in items on the Commerce Control List (CCL) necessary to conform in fact with Australia Group-listed items on which those CCL items are nominally based.

[42] See Appendices 4-3 and 4-4 for revisions in items on the Commerce Control List (CCL) necessary to conform in fact with MTCR- and NSG-listed items on which those CCL items are nominally based.

[43] EAA § 6(h).

[44] 15 C.F.R. § 768.

[45] 15 C.F.R. § 768.2(a).

part 744 of the EAR. These "catch-all" controls require a license for export or reexport to a country of any item, *i.e.*, not just items defined on the CCL as of concern, if "you know" (or you are informed by BXA) that it will be used in a specified nuclear, missile, or chemical or biological warfare (CBW) activity.[46] The "other activities of U.S. persons" controls require a license to:[47]

- Export or reexport to, or transfer within, specified countries, including a foreign-origin item from a foreign country, if the exporter knows or is informed by BXA that it will be used in a specified nuclear, missile, or chemical or biological weapon-related activity.
- Support (including financing, transportation, and freight forwarding) a proscribed export, reexport, or transfer.
- Perform a contract, service, or employment that will assist a proscribed missile or CBW activity.
- Participate in the design or construction of a plant to make chemical weapon precursors in any country not a member of the Australia Group.

4.2.3 Exceptions

Conceptually there are four types of exceptions from Commerce license requirements:

1. Not subject to the EAR.[48]
2. Not covered by one of ten Prohibitions.[49]
3. No license required (NLR) based on a Country Chart.[50]
4. Eligible for a License Exception.[51]

4.2.3.1 Not Subject to the EAR

The only items "not subject to the EAR" that are clearly excepted from all Commerce license requirements are items "exclusively"

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[46] 25 C.F.R. §§ 744.2, 744.3, and 744.4.
[47] 15 C.F.R. § 744.6.
[48] 15 C.F.R. § 734.3(b).
[49] 15 C.F.R. § 736.2(b).
[50] 15 C.F.R. § 738 Supplement 1.
[51] 15 C.F.R. §§ 740, 744, 746, or 754.

controlled by State, Nuclear Regulatory Commission, or Patent and Trade Mark Office.[52] Even the State exception does not literally extend to items arguably on both the Commerce Control List (CCL) and the State U.S. Munitions List (USML), because of the word "exclusively." There are no items controlled exclusively by Treasury OFAC.[53] All Energy nuclear technology controls appear also to be controlled by Commerce.[54] Items controlled exclusively by other agencies listed in Table 1-2 are not listed in "not subject to the EAR."

De minimis rules[55] vary by item and by destination and are, therefore, logically considered along with other exceptions that vary by item and by destination, rather than simply as an exception from license requirements because of being "not subject to the EAR."

Other problems with "subject to the EAR" include:[56]

- Nothing in the definitions of "export" or "reexport"[57] covers license requirements for the export from a foreign country by a U.S. person of specified items to Rwanda or Serbia and Montenegro if the items are foreign-origin.[58]
- Nothing in the definitions of "export" or "reexport" covers statutory sanctions concerning exports from a foreign country by either a foreign person or a U.S. person of foreign-origin items.[59]
- The instruction that an export transiting one country but intended for a second country is deemed to be an export to the second country[60] is not qualified by the prohibition against transiting specified countries unless the export is authorized to the country of transit.[61]

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[52] 15 C.F.R. § 734.3(b)(1)(i, iii, v).

[53] See Chapters 1 and 3 regarding Commerce deference to Treasury which differs by destination and type of transaction but not by item.

[54] 15 C.F.R. §§ 744.2(a) and 744.6(a)(1)(i)(A).

[55] 15 C.F.R. § 734.3(b)(4).

[56] Also see Appendix 6-1.

[57] 15 C.F.R. § 734.2(b).

[58] 15 C.F.R. §§ 746.8(b)(1) and 746.9(a)(1).

[59] EAA §§ 11A, 11B, or 11C and the Nuclear Proliferation Prevention Act of 1994.

[60] 15 C.F.R. § 734.2(b)(6).

[61] 15 C.F.R. § 736.2(b)(8).

- The statement that the only exception from the publicly available exclusion from "subject to the EAR" is encryption[62] omits another exclusion for activities in support of proliferation of weapons of mass destruction.[63]
- The statement that activities subject to the EAR are limited to those related to proliferation of chemical or biological weapons and missile technology[64] omits license requirements for the use of U.S.-registered aircraft to supply or transport specified items to Rwanda or Serbia and Montenegro.[65]

4.2.3.2 Not Prohibited

One cannot assume that any activity not prohibited by one of the ten General Prohibitions is permitted. One might draw that conclusion from the introduction to these Prohibitions, which includes the following:[66]

> A person may undertake transactions subject to the EAR without a license or other authorization, unless the regulations affirmatively state such a requirement.

However, the ten Prohibitions not only omit the Rwanda or Serbia and Montenegro restriction described above but also omit nine of the activities described as violations which are listed in the regulations.[67] One of those nine is mentioned in the introduction to the Prohibitions:[68]

> If you violate any of these ten general prohibitions, or engage in other conduct contrary to the Export Administration Act, the

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[62] 15 C.F.R. § 734.3(b)(3).

[63] 15 C.F.R. § 732.2(b)(1).

[64] 15 C.F.R. § 734.5.

[65] 15 C.F.R. §§ 746.8(b)(1) and 746.9(a)(1).

[66] 15 C.F.R. § 736.1.

[67] Engaging in prohibited conduct; causing, aiding, or abetting a violation, solicitation and attempt, conspiracy, possession with intent to export illegally; misrepresentation and concealment of facts; evasion, failure to comply with reporting, record keeping requirements; and license alteration. 15 C.F.R. § 764.2(a-d, f-j) Prohibition Ten covers § 764.2(e), acting with knowledge of a violation, and Prohibition Four covers § 764.2(k), acting contrary to the terms of a denial order.

[68] 15 C.F.R. § 736.1(c).

> EAR, or any order, license, License Exception, or authorization issued thereunder, as described in part 764 of the EAR[69] regarding enforcement, you will be subject to the sanctions described in that part.

But there is nothing in the introduction to the Prohibitions nor in the Prohibitions themselves concerning the other eight violation activities.

Moreover, the following types of transactions that fall outside what seems to be the applicable Prohibition are covered by another Prohibition, by another agency, or even by another section of the EAR not described in any of the Prohibitions:

- General Prohibition Two Parts and Components does not apply unless the U.S. content incorporated in, or commingled with, a foreign-made item exceeds *de minimis* limits;[70] however, a license is required for specified items even if the *de minimis* limits are not exceeded.[71]
- General Prohibition Three Foreign-Produced Direct Product is limited both by item and by destination; whereas a similar direct product Treasury control covers different items to a different destination (Iran).[72]
- General Prohibition Eight Intransit applies only to items transiting through named foreign countries; whereas items moving intransit through the United States might be caught by General Prohibition One Exports and Reexports.[73]
- The prohibited export by a U.S. person of non-U.S.-origin specified items to Rwanda or Serbia and Montenegro from another foreign country and the prohibited use of a U.S.-registered vessel or aircraft to transport specified items to Rwanda or Serbia and Montenegro,[74] are not described in any of the ten Prohibitions.

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[69] 15 C.F.R. § 764.2(a).

[70] 15 C.F.R. § 736.2(b)(2)(i)(A).

[71] 15 C.F.R. § 734.4(a, b, and e).

[72] 31 C.F.R. § 560.204(b).

[73] The 15 C.F.R. § 740.9(b)(1-4) exceptions from license requirements do not apply to all transactions transiting through the United States.

[74] 15 C.F.R. §§ 746.8(b)(1) and 746.9(a).

- Prohibition Two, which complements the *de minimis* exception from "subject to the EAR," applies only if both the foreign-made item and the U.S. content require a license to the export destination;[75] but the regulations state elsewhere that "the classification of a foreign-made item is irrelevant in determining the scope of the EAR"[76] and that "all" U.S.-origin items wherever located are subject to the EAR.[77]

It would be prudent for an exporter to follow the more restrictive of two inconsistent rules when it is more specific, as in the *de minimis* exceptions and Rwanda and Serbia and Montenegro cases. However, it would be relatively safe to ignore statements that the classification of a foreign-made item is irrelevant and that all U.S.-origin items are subject to the EAR, because the less restrictive inconsistent rules are more specific and it would be unreasonable for the U.S. government to enforce an extraterritorial control that was more restrictive than controls on direct exports from the United States.

There are no exceptions from license requirements that overcome General Prohibitions Four (Denial Orders); Seven (Activities of U.S. Persons); Nine (Orders, Terms, and Conditions); and Ten (Knowledge Violation to Occur). "No exceptions" in the previous sentence does not necessarily mean that these Prohibitions apply to what is excepted from "subject to the EAR";[78] however, Prohibition Seven is construed to apply to the use of publicly available information[79] and you may not rely on the *de minimis* exception for items specifically excluded from that exception.[80] On the other hand, "no exceptions" does mean, with respect to Prohibitions Four and Seven, no NLR from the Country Chart as well as no so-called "License Exception." Moreover, it would be prudent to assume such "no exceptions" from the prohibitions against export by a U.S. person of non-U.S.-origin specified items to Rwanda or Serbia and Montenegro and against the use of a U.S.-registered vessel or aircraft

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[75] 15 C.F.R. §§ 736.2(b)(2)(i) heading and 736.2(b)(2)(i)(B).
[76] 15 C.F.R. §§ 732.2(d) and 734 Supplement 2(a)(4).
[77] 15 C.F.R. § 734.3(a)(2).
[78] 15 C.F.R. § 734.3(b).
[79] 15 C.F.R. § 732.2(b)(1).
[80] 15 C.F.R. § 734.4 (a, b, e).

to transport specified items to Rwanda or Serbia and Montenegro, even though these controls fall outside the ten Prohibitions. With respect to Prohibition Nine, the terms of exceptions are relevant and, with respect to Prohibition Ten, a violation would not be about to occur if the transaction were authorized as an exception. Therefore, "no exceptions" with respect to Prohibitions Nine and Ten simply means that there are no exceptions tailored to overcome these Prohibitions.

There is an immensely bewildering array of exceptions from General Prohibitions One, Two, Three, Five, Six, and Eight. Some of these exceptions vary by destination, some by item, and some by both destination and item. Some of the bewilderment is caused by inconsistencies within the regulations.

A statement that there are no License Exceptions which overcome General Prohibition Eight Intransit[81] is contradicted by the description of that Prohibition, itself, which includes:[82]

> unless a License Exception or license authorizes such an export or reexport directly to such a country of transit.

As a general rule, exporters are advised to follow the more restrictive regulation in instances of inconsistency. However, in this case, the statement that the Prohibition does not apply if a License Exception authorizes direct export is so logical that it is probably safe to ignore the contrary statement that no License Exception overcomes the Prohibition. Indeed, not only License Exceptions but also NLR provisions reasonably apply to Prohibition Eight. As a practical matter, it is unlikely that the government is using its limited manpower to enforce this Cold War relic on a routine basis.

General Prohibition Six Embargoed Countries is generally overcome by the 10 percent *de minimis* rule. The statement of this rule mentions only the computer exception;[83] whereas encryption, spacecraft, technology and source code to produce foreign-made commodities or software, and specified aircraft technologies are excepted elsewhere.[84]

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[81] 15 C.F.R. § 732.4(a).

[82] 15 C.F.R. § 736.2(b)(8).

[83] 15 C.F.R. § 734.4(c) states "Except as provided in paragraph (a)."

[84] 15 C.F.R. § 734.4(a, b, e, h).

There are also inconsistent statements concerning the applicability of License Exceptions to embargoed countries. One rule states:[85]

> Unless a License Exception or other authorization is authorized in part 746, the License Exceptions described in part 740 are not available to overcome this general prohibition.

However, there are several apparent inconsistencies between part 740 and part 746 concerning the applicability of License Exceptions to embargoed countries, *e.g.*:

- License Exception TMP intransit from Canada through the United States applies to "any destination" in part 740[86] and is listed as eligible to Cuba in part 746[87] but is omitted from the part 746 comparable lists of exceptions for Libya and North Korea.[88] There is no apparent reason to exclude Libya and North Korea; but it would be risky to rely on part 740 for this exception.
- License Exception GOV applies to Cuba, Libya, and North Korea per part 746 without limitation; but under part 740 exports may not be made to those countries under the cooperating government portions of GOV.[89] The more restrictive terms in part 740 logically apply.
- License Exception AVS terms in part 746 for Cuba,[90] Libya,[91] and North Korea[92] differ greatly from the explicit terms for those countries in part 740.[93]
- Omission from part 746 of License Exception APR reexports for which direct shipment from the United States is authorized under

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[85] 15 C.F.R. § 736.2(b)(6)(ii).
[86] 15 C.F.R. § 740.9(b)(1)(iv).
[87] 15 C.F.R. § 746.2(a)(1)(ix).
[88] 15 C.F.R. §§ 746.4(b)(2)(ii) and 746.5(a)(1).
[89] 15 C.F.R. § 740.11(b)(2)(iii, iv) and (b)(3)(ii).
[90] 15 C.F.R. § 746.2(a)(1)(x).
[91] 15 C.F.R. § 746.4(b)(2)(ii)(G).
[92] 15 C.F.R. § 746.5(a)(1)(v).
[93] 15 C.F.R. §§ 740.15(a)(2, 3), (b)(1-3), and (c)(1-3). It would be prudent to abide by the more restrictive versions, usually those in part 746; but an exporter adversely affected would have good reason to insist that the government publish only one set of rules.

an unused outstanding license, reexports from Canada that may be exported from the United States under a License Exception, and reexports (return) to the United States[94] may be inadvertent.

A rule in part 732 states that the operation, sales, and software updates portions of License Exception TSU "overcome General Prohibition Five (End-Use and End-User)"[95] and a rule in part 740 states that the general software note mass market software portion of License Exception TSU is available to all except embargoed destinations.[96] However, another rule in part 732 directs the exporter to consult part 744 for License Exceptions applicable to Prohibition Five[97] and the only TSU-eligibility stated in part 744 is for nuclear end-uses and even that is only for the operations and sales portions of TSU and only to allied countries.[98]

Part 744 states that no License Exceptions are available to listed entities of "specified items" except to Indian or Pakistan entities for civil aviation safety.[99] However, this rule does not specify the items that are generally ineligible for License Exceptions to listed entities. One might deduce that items "not elsewhere specified," *i.e.*, EAR99 on the CCL, would be eligible for License Exceptions to listed entities; but other rules in part 744 make EAR99 ineligible for License Exceptions to such entities.[100]

There is also confusion as to which items are eligible for the aviation safety eligibility for License Exceptions to Indian and Pakistani listed entities. The general rule[101] is silent on this point. Specific rules refer to items listed in § 740.2(a)(5).[102] The list in § 740.2(a)(5) is limited to items controlled for missile technology (MT) reasons. It would be irrational to make only those items eligible, since many less sensitive non-MT items might be needed for aviation safety. The drafter of the various Indian and Pakistani aviation safety provisions assured the author that the intent was

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[94] 15 C.F.R. § 740.16(c-e).
[95] 15 C.F.R. § 732.3(h)(2).
[96] 15 C.F.R. § 740.13(d)(3)(i).
[97] 15 C.F.R. § 732.4(a).
[98] 15 C.F.R. § 744.2(c).
[99] 15 C.F.R. § 744.1(c).
[100] 15 C.F.R. §§ 744.10(b) and 744.11(b).
[101] 15 C.F.R. § 744.1(c).
[102] 15 C.F.R. §§ 744.11(b) and 744.12(b).

to permit any item to be exported for this purpose under License Exceptions. However, given the general rule to abide by the more restrictive language in instances of inconsistency, it would nevertheless be risky to rely on such informal guidance.

The rule to consult part 744 for License Exceptions applicable to Prohibition Five (End-Use and End-User) may explain why the portion of License Exception AVS for exports to U.S. or Canadian airline's installation or agent appears in both part 740 and part 744.[103]

General Prohibition Three (Foreign-Produced Direct Product) may be overcome by License Exceptions described in part 740.[104] License Exceptions described in part 740 and cross-referenced in part 746 overcome Prohibition Six (Embargo);[105] but Prohibition Three is silent as to whether these License Exceptions also overcome Prohibition Three to Cuba, North Korea, and Libya.

For non-embargoed destinations affected by Prohibition Three, CIV[106] is the most likely License Exception to be applicable, since these destinations are not eligible for License Exception TSR.[107] *De minimis* would probably not be a practical means to avoid a license requirement, because of the prerequisite report for *de minimis* cases of commingled software or technology.[108]

General Prohibition Two (Parts and Components) may also be overcome by License Exceptions described in part 740.[109] Since Prohibition Two applies only if both the foreign-made item and the U.S. content are controlled to the export destination, any NLR provision based on the Country Chart or any License Exception which would decontrol either the foreign-made item or the U.S. content would overcome this Prohibition.

Most transactions "subject to the EAR" fall under General Prohibition One (Exports and Reexports). The scope of this Prohibition is determined by the proper ECCN and the Country Chart and it is superseded by each License Exception described in part 740.[110]

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[103] 15 C.F.R. §§ 740.15(c)(2) and 744.7(b).
[104] 15 C.F.R. § 736.2(b)(3)(iii).
[105] 15 C.F.R. § 736.2(b)(6)(ii).
[106] 15 C.F.R. § 740.5.
[107] 15 C.F.R. § 740.6(a).
[108] 15 C.F.R. § 734 Supplement 2(b)(1).
[109] 15 C.F.R. § 736.2(b)(2)(iii).
[110] 15 C.F.R. § 736.2(b)(1)(i, ii).

4.2.3.3 No License Required (NLR)

The clearest set of exceptions is based on the Country Chart.[111]

For some ECCNs, determination of whether or not NLR applies appears to be simple. For example, ECCN 1A984 is controlled only for Crime Control and the "License Requirements" section of the ECCN refers to CC Column 1 in the Country Chart. That Column has an "X" for every country except NATO members, Australia, Japan, and New Zealand. Thus, NLR applies for the entire item to those countries without the "X." However, even with this simple example, be careful! ECCN 1A984 covers, *inter alia*, chemical agents, including tear gas formulations containing 1 percent or less of CS or CN. Category XIV(a) on the U.S. Munitions List covers chemical agents, including but not limited to tear gases, except tear gas formulations containing 1 percent or less CN or CS. You would not know from reading ECCN 1A984 that tear gas not covered in that ECCN was covered by the USML. Even after reading both ECCN 1A984 and Category XIV(a), you would not know whether a license was required to NATO members, Australia, Japan, and New Zealand for other "chemical agents," which are literally included on both the CCL and the USML without limit and which, under the USML, require a license to all countries, including Canada.[112] Nor would you know whether to apply to Commerce or to State for a license to export to countries subject to ECCN 1A984 controls.[113] For most other ECCNs the NLR determination is even more complex than for

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[111] 15 C.F.R. § 738 Supplement 1 .This set is called No License Required (NLR). The Country Chart shows, for each country of destination, whether or not a license is required, absent a License Exception. Each ECCN shows under "License Requirements" which columns of the Country Chart are applicable for the indicated portion of that ECCN.

[112] 22 C.F.R. § 126.5(b)(8).

[113] A knowledgeable exporter in this field advises that the USML coverage is intended to be limited to chemical agents specifically designed for a military application that do not have predominant civil applications or performance equivalent for civil applications, pursuant to 22 C.F.R. § 120.3(a), leaving all other chemical agents subject to Commerce jurisdiction. However, this is a risky interpretation, given that it is not supported in 22 C.F.R. § 121.1 Category XIV(a). Moreover, the exporter does not know whether a particular chemical agent may have "significant military applicability" warranting 22 C.F.R. § 120.3(b) overriding § 120.3(a); and, even in the absence of a "significant" finding, the § 120.3 policy applies only as a limitation on designations "in the future" and Category XIV(a) was designated before § 120.3 was revised in 1993.

1A984. This is because license requirements are shown in ECCNs separately for each reason for control and an export is eligible for NLR only to a country for which there is no "X" in *any* of the applicable Country Chart columns. It is necessary to check against each "License Required" line and to be guided by the most restrictive applicable line.

For example, digital computers described in ECCN 4A003 are eligible for NLR as follows:

- Entire item to Canada, because there is no X for Canada in NS Column 1, NS Column 2, MT Column 1, CC Column 1, or AT Column 1.
- Sub-items a, d, e, and g provided not covered by sub-items b or c or MT (used as ancillary equipment for test facilities and equipment controlled by 9B005 or 9B006) to NATO excluding Iceland, Australia, Japan, and New Zealand, because there is no "X" for these countries in NS Column 2, CC Column 1, or AT Column 1.
- Sub-items a, d, e, and g provided not covered by sub-items b or c, MT, or CC (for fingerprint equipment) to Austria, Ireland, Sweden, and Switzerland and, unless the computer CTP exceeds 33,000 mtops, South Korea, because there is no X for these countries in NS Column 2 (except for the South Korea "X" which is modified by the 33,000 mtops limit in footnote 2) or in AT Column 1.[114]
- The lack of an "X" for Iceland in CC Column 1 is irrelevant for 4A003, because Iceland is marked "X" in both NS Column 1 and NS Column 2 and there is no portion of 4A003 for which one of these NS Columns is not applicable.
- The "X" markings in AT Column 1 are irrelevant, because both Sudan and Syria are also marked "X" in NS Column 1 and in NS Column 2.
- NLR applies only to Canada for sub-items b and c, whether or not MT is applicable, because NS Column 1 and MT Column 1 are identical in showing an "X" for all countries except Canada.

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[114] Computer Tier 2 limit.

- Digital computers which are fault-tolerant and covered by .a are not eligible for NLR except to Canada if they are also covered by b or c CTP limits.

4.2.3.4 License Exceptions

The above is a complete analysis for ECCN 4A003 of "NLR," as that term is used in the EAR. However, License Exceptions GBS, CIV, CTP, and LVS remove license requirements not removed by NLR.

Because of GBS, no license is required to export items covered by sub-items d, e, or g, provided they are not also covered by sub-items a, b, or c or by MT or CC, to any country in Country Group B (Free World). CIV removes the license requirement for these same sub-items to any country in Country Group D:1 (COCOM-proscribed destinations) subject not only to the GBS restrictions but also limited to both a civil end-use and a civil end-user and, if covered by sub-item d, only if the 3-D vector rate is less than 100M vectors/second.

License Exception CTP removes the license requirement for sub-items a, b, and c, unless covered by MT or CC, from Computer Tier 1 countries regardless of the CTP level and for Computer Tier 2 countries if the CTP does not exceed 33,000 mtops. Effective August 14, 2000, License Exception CTP applies to Tier 3 countries unconditionally up to 12,500 mtops[115] and up to 20,000 mtops subject to various conditions, including that neither the end-use nor the end-user is military or related to various weapons of mass destruction and that exporters notify Commerce before shipping and apply for a license if requested by Commerce so to do. For the range between 12,500[116] and 20,000 mtops, the prior notification condition is a virtual license requirement for several Tier 3 countries. Moreover, it is misleading to describe as a License Exception a procedure requiring advance notification to the government.

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[115] Six-month delay from February 14 to August 14 to permit Congressional review.

[116] Six-month delay from February 14 to August 14 to permit Congressional review.

Restrictions on sub-items d, e, and g modifying eligibility for License Exception CTP have no effect to destinations eligible for License Exceptions GBS or CIV, because those License Exceptions have no such restrictions. Conversely, although ECCN 4A003 states that License Exception CTP applies only to sub-items a, b, and c, § 740.7(a) states that sub-items d and g are authorized under this License Exception when exported with computers as part of a system. However, incongruously, if the system is under 6,500 mtops, License Exception CTP is not available.[117]

ECCN 4A003 provides that License Exception LVS permits shipments valued at $5,000 or less except for MT and except for CTP exceeding 10,000 mtops.[118] The CC portion of 4A003 is also ineligible for LVS.[119] LVS eligibility is limited to Country Group B, which excludes "controlled" countries listed in Country Group D:1.[120] Computer Tier 2 does not benefit from LVS, because License Exception CTP is available up to 33,000 mtops for sub-items a, b, and c regardless of value and License Exception GBS is available for sub-items d, e, and g regardless of value. However, some Computer Tier 3 countries do benefit from LVS.[121]

GBS, CIV, CTP, and LVS License Exceptions clearly are not available for the MT and CC portions of 4A003; but the impact of NP controls is not as apparent. The License Requirement portion of 4A003 states that NP applies to computers greater than 6,500 mtops[122] "unless a License Exception is available." GBS and CIV eligibility is limited to items controlled for national security reasons "only." Thus, they cannot overcome NP controls. But NP applies only if an mtops limit is exceeded and the mtops parameter is not applicable to the 4A003 sub-items for which GBS and CIV are available. CTP and LVS texts do not restrict their eligibility to items controlled only for national security reasons; although LVS, at least, has been informally interpreted to be so limited. In any event, NP controls do not nullify either CTP or LVS license exceptions, because

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[117] This incongruity probably unintended.

[118] The 10,000 mtops LVS limit was set when the Tier 2 limit was 10,000 mtops.

[119] Crime Control items are ineligible for most License Exceptions, per 15 C.F.R. § 740.2(a)(4).

[120] 15 C.F.R. § 740.4.

[121] Computer Tier 3 countries listed in 15 C.F.R. § 740.7(d)(1) include some which are in Country Group B, rather than Country Group D:1.

[122] The Wassenaar limit is 6,500 mtops.

NP does not apply if "a License Exception is available." Thus, NP has no effect on 4A003 license requirements. Placement of the NP paragraph in 4A003 outside of the License Requirements section confirms this conclusion. However, applications for computers which do require a license for other reasons will be reviewed using, *inter alia*, nuclear licensing policy criteria.[123]

The inter-relationships of the analyses of NLR and of License Exceptions GBS, CIV, CTP, and LVS are so complex that it is worthwhile to recapitulate before introducing still more complications. Table 4-2 shows the cumulative effect on General Prohibition One (Exports and Reexports) and General Prohibition Two (Parts and Components Reexports) of NLR and License Exceptions GBS, CIV, CTP, and LVS on ECCN 4A003 but does not include, on the one hand, the effect of other controls on digital computers and, on the other hand, the effect of many other License Exceptions.

A computer would require a State Department license to any country except Canada if covered by USML Category XI(a)(6), which reads:

> specifically designed or developed for military application (or) specially modified for use with any defense article in any category of the U.S. Munitions List.

In addition, equipment designed or rated for transient ionizing radiation and hybrid computers specially designed for missiles are subject to State jurisdiction.[124]

A Commerce license is required to all countries except Canada by ECCN 4A101 or to 4A001.a if 4A101 parameters are met or exceeded. For the remainder of 4A001.a, NLR applies if to NATO excluding Iceland, Australia, Japan, or New Zealand or, if $5,000 or less, to any country in Country Group B. Arguably these limits do not apply if the equipment was not specially designed to operate at the specified temperatures or to be radiation-hardened to exceed the stated specifications but might, if tested, meet those specifications.

ECCN 4A001.b covers computers performing information security functions. It appears from NS Column 2 for 4A001 that a license

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[123] 15 C.F.R. § 742.3(b).

[124] 15 C.F.R. § 774 Supplement 1 "Related Controls" section of ECCN 4A001 and annotation to that effect in ECCN 4A102.

is not required to NATO excluding Iceland, Australia, Japan, or New Zealand. However, ECCN 5A002 requires a license for such equipment to all countries except Canada.

A Commerce license is required to all countries except Canada by ECCN 4A002 for hybrid computers combined with specially designed software for missiles. License requirements for other hybrid computers are ambiguous because there is no conjunction linking sub-items a and b. If one assumes "and," then 4A002 is a subset of 4A003, because it would cover nothing not also covered by 4A003. If one assumes "or," then hybrid computers meeting 4A002.b specifications would be NLR only to NATO excluding Iceland, Australia, Japan, or New Zealand or, if $5,000 or less, to any country in Country Group B.

ECCN 4A980 covers other computers for fingerprint equipment, on the same basis as the CC portion of 4A003.

ECCN 4A994 covers computers exceeding much lower limits than specified in 4A003. ECCN 4A994 requires a license only to AT Column 1, which has an "X" only for Sudan and Syria. The Sudan "X" is largely irrelevant, because Treasury prohibits exports to that country of all items from the United States or by a U.S. person from a foreign country. However, 4A994 specifications are relevant to Commerce controls on reexports to Sudan of U.S.-origin computers by non-U.S. persons and on all exports to Syria from the United States or reexports to Syria of U.S.-origin computers whether or not by a U.S. person.

"LR" in Table 4-2 for 4A003 could be overcome by other License Exceptions.

License Exception APR literally permits reexports of 4A003, other than the MT and CC portions thereof, from A:1 or "cooperating" countries[125] to all of Computer Tier 2 except Burma, to all of D:1 except Cambodia and Laos, and to the following ten Computer Tier 3 countries which are not D:1, D:2, D:3, or D:4: Algeria, Andorra, Angola, Bosnia & Herzegovina, Macedonia (former Yugoslav Republic of), Mauritania, Morocco, Montenegro and Kosovo, Tunisia, and Vanuatu.[126] APR thus literally overcomes the 33,000 mtops limit for reexports to Computer Tier 2 except Burma and numerous limits for many Computer Tier 3 countries. However, export from the United States to an A:1 or a "cooperating"

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[125] 15 C.F.R. § 740.11(b)(3)(ii).

[126] 15 C.F.R. § 740.16(a).

country with the intent to reexport to one of these Tier 2 or Tier 3 countries would be regarded as a direct export not eligible for APR. Indeed, any use of this portion of License Exception APR to overcome these limits would be risky, since it was originally justified on the ground that the United States should not use its reexport controls to reverse approvals it gave in COCOM and the United States no longer has the opportunity to stop exports by its allies in the Wassenaar arrangement successor to COCOM. Another portion of APR is an empty box for computers.[127]

Other License Exceptions apply to license requirements for software and technology for the development, production, or use of 4A003 computers which are otherwise controlled by 4D001 or 4E001. The operation technology and software portion of License Exception TSU[128] permits license-free export of the minimum necessary to operate equipment authorized for export or reexport by a license, NLR, or a License Exception. Thus, license exceptions for equipment exports are not frustrated by license requirements on software or technology necessary to operate that equipment. However, encryption software is not regarded as part of the "minimum necessary" software to operate a computer.

Other use software or technology is authorized by License Exception TSR, as is development or production software or technology to named EU countries or to other countries in Country Group B unless 4A003.b or c exceeds 10,000 mtops.[129] The R in TSR stands for "restriction," which means that, prior to export or reexport, the importer must provide a written assurance against unauthorized reexport or release of the software or technology or export of the direct product of the software or technology.[130] Note that TSR is not available for 4D003.c or 5D002 soft-ware to perform information security functions. Other license exceptions, subject to other restrictions, apply to encryption software.[131]

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[127] 15 C.F.R. § 740.16(b) permits reexport of the non-MT and non-CC portion of 4A003 from an A:1 or cooperating country to Argentina, Singapore, or Taiwan, thus overcoming the 33,000 mtops limit to those three Tier 2 countries. But this is done by 15 C.F.R. § 740.16(a) to all Tier 2 countries except Burma.

[128] 15 C.F.R. § 740.13(a).

[129] The 10,000 mtops TSR limit was set when the Tier 2 limit was 10,000 mtops.

[130] 15 C.F.R. § 740.6(a)(1, 2, 3).

[131] 15 C.F.R. §§ 740.8 and 740.17; see Chapter 5.

4.2.3.5 Other Agencies

Commerce exceptions from license requirements apply to exports under the jurisdiction of agencies other than Commerce only to the extent the regulations of those agencies so state.

Treasury OFAC regulations apply License Exceptions BAG, the U.S. Government portion of GOV, GFT, and the publicly available exclusion from "subject to the EAR" to Libya[132] and BAG and the USG portion of GOV to Iraq.[133] OFAC general licenses to North Korea and Cuba differ substantially from Commerce exceptions.[134] OFAC exceptions for humanitarian donations to Iran[135] and Sudan[136] are similar to the humanitarian donations portion of Commerce License Exception GFT.[137]

Various Department of State exemptions from controls on munitions[138] parallel some of the Commerce exceptions from license requirements.[139]

4.2.3.6 Exporter Action

For transactions qualifying for an exception from Commerce license requirements, the exporter need not apply for, nor receive, a license document. However, some exceptions are conditioned on the exporter taking other actions, either before or after the export takes place. Some of the required action before using a License Exception is barely distinguishable from applying for, and waiting for issuance of, a license. It is the exporter's responsibility, before using an exception, to determine that its conditions are, or will be, fulfilled. This involves understanding not only the specific conditions for that exception but also the prohibitions on the use of any License Exception.[140]

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[132] 31 C.F.R. § 550.504.

[133] 31 C.F.R § 575.507(a)(1).

[134] 31 C.F.R. §§ 500.501-599, 500.801(a), 515.501-599, 515.801(a); also see section 3.4.6 in Chapter 3.

[135] 31 C.F.R. § 560.210(b).

[136] 31 C.F.R. § 538.205.

[137] 15 C.F.R. § 740.12(b).

[138] 22 C.F.R. §§ 123.16-21 and 125.4-6.

[139] See sections 2.2 and 2.3.2 in Chapter 2.

[140] 15 C.F.R. § 740.2(a).

An exporter must take the following actions before using various exceptions from Commerce license requirements:

- Before use of *de minimis* for U.S.-origin software or technology commingled with foreign software or technology, file a report of calculations and wait 30 days for a BXA response before proceeding without a license.[141]
- Before use of License Exception TSR, obtain a written assurance from the importer against reexport or export of the foreign-made product of the technology or software.[142]
- Before use of License Exception CTP to the People's Republic of China, obtain a PRC End-User Certificate.[143]
- Before use of License Exception CTP to a Computer Tier 3 country, notify BXA by filing a BXA-748P application form and, before proceeding to export without a license, wait for ten days following BXA registration of the notification, during which period BXA may determine that a license is necessary for the export.[144]
- Before use of portions of License Exceptions KMI, TSU, or ENC for encryption equipment or software, notify BXA and, in some instances, wait for one-time BXA approval after technical review, before exporting without a license.[145]
- Before use of NLR for ECCN 1C355, obtain an End-Use Certificate.[146]
- Before use of License Exception AVS for an aircraft on temporary sojourn, obtain a license for any item carried on that aircraft for which a license is required.[147]
- Before use of the return of shipments refused entry portion of License Exception TMP to return an item to Iran, Iraq, or Sudan

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[141] 15 C.F.R. § 734 Supplement 2(b).
[142] 15 C.F.R. § 740.6(a)(1, 2, 3).
[143] 15 C.F.R. § 740.7(d)(4).
[144] 15 C.F.R. § 740.7(d)(5).
[145] 15 C.F.R. §§ 740.8(b)(1), 740.13(e), 740.17(a)(2) and (a)(3).
[146] 15 C.F.R. § 745.
[147] 15 C.F.R. § 740.15(a)(1)(iii), (a)(2)(i)(D), (a)(2)(ii)(D).

which was refused entry by Treasury, obtain a license from OFAC for return of that item.[148]

- Before use of License Exception WRC, obtain a statement that the logs were not harvested on State or Federal Lands outside Alaska and a certificate showing quantity and type of brand, tag, or paint marking.[149]

An exporter must take the following actions after using various exceptions from Commerce license requirements:

- After use of License Exception CTP to a Computer Tier 3 country, submit post-shipment report to BXA.[150]
- After use of License Exception KMI or portions of ENC report details to BXA.[151]
- After use of License Exception TMP and before sale or disposal abroad, obtain BXA authorization[152] or use an outstanding license.[153]
- After use of License Exception TMP, request authorization from BXA to retain the item abroad for more than 12 months.[154]
- After use of License Exceptions GBS, CIV, TSR, LVS, CTP, or GOV for specified items to specified countries, submit a semiannual report to BXA.[155]
- After use of any exception to ship specified chemicals to specified countries, submit a semiannual report to BXA.[156]
- After each export, maintain specified types of records for five years.[157]

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[148] 15 C.F.R. § 740.9(b)(4)(ii).
[149] 15 C.F.R. § 754.4(c)(2).
[150] 15 C.F.R. § 740.7(d)(5)(v).
[151] 15 C.F.R. §§ 740.8(d) and 740.17(g).
[152] 15 C.F.R. § 740.9(a)(4)(i).
[153] 15 C.F.R. § 740.9(a)(4)(ii).
[154] 15 C.F.R. § 740.9(a)(4)(iii).
[155] 15 C.F.R. § 743.
[156] 15 C.F.R. § 745 Supplements 1 and 3.
[157] 15 C.F.R. § 762.

4.2.4 CCL vs. Multilateral Controls

The numbering and texts of ECCNs on the Commerce Control List (CCL) follow closely that of the Dual-Use List of the European Union (EU). The EU List, in turn, follows the format and numbering of the Wassenaar Dual-Use List (WDUL). The other multilateral regimes (MTCR, NSG, and Australia Group (AG)) are gradually adopting the WDUL (and EU and CCL) format but the numbering of their items differs from that of the EU and the CCL. There are also other problems in achieving conformity between the CCL and multilateral controls, *e.g.*:

- The CCL does not contain the full text of WDUL items under State jurisdiction.[158]
- Many discrepancies arise in CCL efforts to identify portions of Wassenaar items which overlap MTCR or NSG coverage.[159]

Other differences are apparently inadvertent, based on the following statements in the EAR, which are not entirely correct but which indicate intentions:

- Controls on (CB) items . . . are consistent with lists agreed to in the Australia Group.[160]
- Controls on (MT) items . . . are consistent with lists agreed to in the MTCR and included in the MTCR Annex.[161]

Appendices 4-2 through 4-5 suggest how the apparent intent of consistency could be achieved. These suggestions are in the form of line-in ~~line-out~~ changes to the CCL items to correspond to the substance of the WDUL, the WML, the MTCR Annex, the NSG list, and the AG Annexes, respectively. **The revisions in these Appendices are not in effect and some of them may never be.** However, unless changes along these lines are made, discrepancies between multilaterally-based ECCNs and the multilateral texts will continue.

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[158] See Appendix 1-3 for the full text of such items.
[159] The EU List does not attempt to do this.
[160] 15 C.F.R. § 742.2(d) last sentence.
[161] 15 C.F.R. § 742.5(d) last sentence.

4.2.4.1 Munitions Production and "Specially Designed"

There are discrepancies in every part of the lists, any one of which could cause serious discrimination against an exporter adversely affected. The most egregious example is in the area of munitions production and the related issue of the meaning of "specially designed."

Appendix 1-3 details anomalies resulting from the assignment of jurisdiction to State for equipment to produce missiles, which is a subset of munitions production equipment for which Commerce retains jurisdiction. The problem runs deeper, in that the Commerce munitions production text uses an obsolete text which COCOM radically revised almost 20 years ago. Wassenaar continues the revised COCOM wording.

An example of the centrality of munitions production to export controls is the *Matrix Churchill* case in the United Kingdom. Criticism of the British Government over this case led to a vote of confidence which that government survived by only one vote. It concerns item ML 18 on the British control list, which covers equipment specially designed or modified for the production of items on a military goods list. This item is similar to Wassenaar Muntions List (WML) item 18, which covers equipment specially designed or modified for the production of items referred to in the WML. The case turned on whether a license was required to export general purpose machine tools because of knowledge that they were intended to be used to produce military goods.[162]

In an ongoing *Fiber Materials, Inc. (FMI)* case, the U.S. Government argues that the meaning of "specially designed" in the COCOM (now Wassenaar) context is "capable of being used with." Moreover, a U.S. Government witness testified that general purpose controls, not one of which would require an export license, would,

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[162] This case is described in a multi-volume "Report of the Inquiry into the Export of Defense Equipment and Dual-Use Goods to Iraq and Related Prosecutions" by Vice Chancellor Richard Scott, ordered by The House of Commons to be printed February 15, 1996. The Scott report noted, in paragraph K2.15, that the Department of Trade and Industry applies to ML 18 the MTCR definition of "specially designed" ("... unique properties ... no other function or use ... not capable of producing other types of components") and, in paragraph G18.18, that an aggregation or configuration that could not be used for any other purpose would not make the machine tools "specially designed."

nevertheless, require a license, as "specially designed," if aggregated and configured on a control panel that, with minor modifications, could be used with a hot isostatic press subject to export controls.

These two cases raise a host of unanswered questions, as set forth in Table 4-3.

4.2.4.2 Software

Of the many software discrepancies identified in Appendices 4-2 through 4-5, those described below are particularly significant.

One anomaly mentioned in neither the Appendices nor in what follows here is the NSG use of an old COCOM definition of "specially designed software." This was designed to limit types of software specified as excepted from control to the "minimum . . . necessary." Its use by NSG to describe software under control is illogical.

Significant software discrepancies include:

- CCL coverage of software for items that do not specify software coverage in their multilateral texts.
- CCL coverage of development and production software compared with EU coverage of only use software.
- Different interpretations of "specially designed" or other connective expressions.

The CCL covers software for the following MTCR commodities for which there is no explicit software coverage in the MTCR Annex:

- 1A102
- 1B115
- 1B116
- 1C001
- 1C007
- 1C011
- 1C101

- 1C107
- 1C111
- 1C116
- 1C117
- 1C118
- 9A110
- 9A120

The following software ECCNs omit connective words such as "specially designed," "designed or modified," or "required" and simply use the ambiguous word "for":

- 1D002
- 7D994
- 9D018

4.2.4.3 Technology

Of the many technology discrepancies identified in Appendices 4-2 through 4-6, those described below are particularly significant:

- Several different multilateral General Technology Notes (GTNs) but only one CCL GTN.
- Lack of guidance as to the meaning of "for" in many technology ECCNs.
- Principal issues relating to multiple General Technology Notes are as follows:
  - MTCR, NSG, and AG technology is covered by ECCNs which refer to the Wassenaar GTN; but these regimes use different GTNs.[163]
  - The AG GTN applies only to chemicals, whereas 1E351 and 2E301 cover biological as well as chemical items.

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[163] See Appendix 4-6.

The following technology ECCNs omit reference to any GTN and also omit connective words such as "specially designed," "designed or modified," or "required" and simply use the ambiguous word "for":

- "Other" technology covered by 1E002.a-f, 2E003.a-f, 3E002, 5E001.b.2-10, 7E004.a-c, 8E002.a, b, and 9E003.e.
- Wassenaar Munitions List technology covered by 0E018, 2E018, and 9E018,[164] even though, unlike COCOM, the WML GTN is identical to the WDUL GTN and therefore is limited by the word "required."[165]
- All unilateral technology covered by ECCNs xE9xx, except 3E980.

4.3 LICENSING POLICY

An understanding of the licensing policy pursued by the Department of Commerce is crucial in assessing the prospects for obtaining an export license. This understanding is vital in terms of judging whether an investment or marketing effort is likely to yield rewards or whether a sales opportunity will run counter to U.S. policy and be frustrated by the denial of a license. The more definitive a policy statement is, of course, the more useful it is to exporters. Unfortunately, many such statements tend more to the general than to the specific. They are, moreover, subject to change, often without advance notice.

Licensing policy is set forth in broad terms in the Export Administration Act of 1979, as amended.[166] More specific guidance is found in the implementing Export Administration Regulations (EAR). However, hard evidence comes only from the day-to-day licensing actions of the Bureau of Export Administration. A policy line is difficult for exporters to discern from these daily actions, directed as they necessarily are to particular transactions which are normally kept confidential. Usually the only way to learn the current policy applicable to your export trade is to experience several denials

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[164] There is no CCL technology coverage for 6A018 or 8A018.

[165] In the definition of "required" in 15 C.F.R. § 772, the word "not" should not appear in the penultimate sentence.

[166] See section 4.1 *supra*.

or approvals of your own applications. Even then you could be surprised because of the flexibility of the regulatory process. The same item might be subject to different treatment for different countries or even for different end-users or end-uses in the same country.

The policies for various country groups, individual countries within those groups, and various reasons for control range from virtually complete embargoes for a few countries to no control whatsoever on most exports to Canada.[167]

4.3.1 Total Embargoes

Virtually total embargoes are administered by Commerce on exports to North Korea, Cuba, and Serbia excluding Kosovo. A licensing policy is in effect generally to deny authorizations to export or reexport commodities, software, or technology to these destinations. Similar total embargoes, administered by Treasury OFAC, apply to Iraq, Iran, Sudan, and Taliban-controlled areas of Afghanistan. Controls to Libya are almost as restrictive, except that medical and agricultural items are not controlled to Libya. However, there are a few exceptions from license requirements to embargoed countries.[168]

Commerce licensing policy on exports of specified items to Cuba was relaxed on May 13, 1999:[169]

> Exports of food (both solids and liquids) and agricultural commodities may be approved, on case-by-case basis, for use by independent non-government entities in Cuba .... Agricultural commodities that will be considered for approval include, but are not limited to, insecticides, herbicides, pesticides, seeds and fertilizer. Agricultural equipment is not eligible ....

4.3.2 Controlled Countries

Licensing policy towards countries formerly proscribed by COCOM[170] continues to be more restrictive than towards other countries, even though many of these "controlled countries" now

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[167] 15 C.F.R. §§ 742, 744, and 746.

[168] See Appendix 4-3.

[169] 15 C.F.R. § 746.2(b)(4)(iii).

[170] Country Group D:1 in 15 C.F.R. 740 Supplement 1.

cooperate in the Wassenaar arrangement and in other multilateral control regimes. Policy for items controlled for national security reasons proposed for export to countries other than "controlled countries" is:

> to approve applications unless there is a significant risk that the items will be diverted to a country in Country Group D:1.[171]

"Controlled countries" themselves are divided into four groups, each with a different licensing policy. The four groups are: (1) China; (2) Cambodia and Laos; (3) Bulgaria, Latvia, Kazakhstan, Lithuania, Mongolia, and Russia; and (4) the remainder, namely, Albania, Armenia, Azerbaijan, Belarus, Estonia, Georgia, Kyrgyzstan, Moldova, Romania, Tajikistan, Turkmenistan, Ukraine, Uzbekistan, and Vietnam.

4.3.2.1 China

Stated China policy dates from the early 1980s, when the United States sought to use the China card to contain the USSR. The regulations state:[172]

> For the People's Republic of China, the general licensing policy is to approve applications except that those items that would make a direct and significant contribution to electronic and anti-submarine warfare, intelligence gathering, power projection, and air superiority receive extended review or denial.... Items may be approved even though they may contribute to Chinese military development or the end-user or end-use is military.

In fact, licenses for Chinese military end-users or end-uses are not now being approved.

China sanctions legislation, following the Tiananmen Square 1989 crackdown, requires a restrictive licensing policy. Nuclear and crime control items must be denied unless the President reports progress on a program of political reform or makes a national interest determination. That legislation provides for denial of license applications:

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[171] 15 C.F.R. § 742.4(b)(1).
[172] 15 C.F.R. § 742.4(b)(7).

> for use in a nuclear production or utilization facility of any goods or technology which . . . could be of significance for nuclear explosive purposes. . . .[173]

This did not broaden the scope of exports subject to review, which include Nuclear Referral List items, whether or not they are for use in a nuclear production or utilization facility, and any item, whether or not on the Nuclear Referral List, destined for such a facility. However, the legislation does require denial of license applications for NP items for use in, or judged likely to be diverted for use in, such a facility.

Macau was added to the Country Chart, to Computer Tier 3, and to Country Groups D:1, D:3, and D:4 as a separate entity on May 18, 1999. The effect is to treat Macau, in general, as restrictively as the People's Republic of China is treated. However, Hong Kong remains as a separate entity which is treated more favorably than the PRC.

4.3.2.2 Cambodia and Laos

The policy for Cambodia and Laos dates from the Vietnam war era, when the United States was concerned that these countries might serve as conduits to our adversaries in that conflict. The regulations state:[174]

> The general policy for Cambodia and Laos is to approve license applications when BXA determines . . . that the items . . . are not likely to be diverted to another country or use contrary to the national security or foreign policy controls of the United States.

4.3.2.3 Other Controlled Countries

The policy for Bulgaria, Latvia, Kazakhstan, Lithuania, Mongolia, and Russia is "enhanced favorable consideration."[175] This contrasts with the following policy for the other D:1 countries, namely, Albania, Armenia, Azerbaijan, Belarus, Estonia,

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[173] Pub. L. No. 101-246, § 902(a)(b)(A)(i).
[174] 15 C.F.R. § 742.4(b)(6).
[175] 15 C.F.R § 742.4(b)(5).

Georgia, Kyrgyzstan, Moldova, Romania, Tajikistan, Turkmenistan, Ukraine, Uzbekistan, and Vietnam:[176]

> . . . approve applications when BXA determines . . . that the items are for civilian use or would otherwise not make a significant contribution to the military potential of the country or destination that would prove detrimental to the national security of the United States.

These distinctions are also obsolete. For example, Estonia and Romania are not now treated more restrictively than Bulgaria and Kazakhstan.

4.3.3 Syria

Syria is the only country designated as supporting terrorism that is not subject to a virtually total embargo. Licensing policy is generally to deny the broad range of items requiring a license to Syria.[177]

4.3.4 Countries of Missile Concern

Licensing policy must take into consideration EAA legislation establishing a policy of denial for listed items to a missile facility in any country not an adherent to the MTCR regime and to any facility in a country designated as supporting terrorism.[178]

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[176] 15 C.F.R. § 742.4(b)(2).
[177] 15 C.F.R. § 742.9 and 742 Supplement 2.
[178] EAA § 6(l)(3).

TABLE 4-1
Categories of Commerce Foreign Policy Controls

Category	Destinations	Items Controlled
Embargoes	North Korea, Cuba, Iran, Iraq, Serbia	All
Libya	Libya	Reexports except medical and agricultural
Antiterrorism	Syria, Sudan[1]	Aircraft, security controlled items, other items[2]
Regional stability	Various[3]	Munitions production, military vehicles, image intensifiers, INS technology

[1] In addition, North Korea, Cuba, Iran, Iraq, and Libya have been designated, under EAA section 6(j), as repeatedly providing support for acts of international terrorism. On May 9, 1997, the Acting Secretary of State, pursuant to section 40A of the Arms Export Control Act as added by the Antiterrorism and Effective Death Penalty Act of 1996 (Public Law 104-132) (22 U.S.C §§ 2771 *et seq.*) and Executive Order 11,958, designated Afghanistan as well as these six countries as "not cooperating fully with United States antiterrorism efforts" (May 22, 1997, 62 Federal Register No. 99, page 28,097). However, Commerce does not impose antiterrorism controls on exports to Afghanistan. Although State denies arms exports to Afghanistan pursuant to 22 C.F.R § 126.1(a), Afghanistan is not included in the § 126.1(d) list of countries subject to State terrorism controls. Effective July 6, 1999, Taliban-controlled areas of Afghanistan are subject to a total embargo. Sudan is subject to a Treasury embargo but to lesser Commerce controls on reexports by non-U.S. persons not subject to Treasury controls.

[2] Includes ECCNs xx99x, which are, for the most part, obsolete items removed from COCOM or Wassenaar coverage. The Iran-lraq Arms Non Proliferation Act of 1992 established the policy of opposing transfers that could materially contribute to acquiring chemical, biological, nuclear, or destabilizing numbers and types of advanced conventional weapons.

[3] Munitions production and military vehicles: all except NATO, Australia Japan, New Zealand; image intensifiers and inertial navigation software and technology: all except Canada.

TABLE 4-1 (CONTINUED)

Category	Destinations	Items Controlled
Chemical and biological weapons	Various[4]	Chemicals, microorganisms, related equipment
Human rights	All except NATO, Australia, Japan, New Zealand	Crime control and detection instruments and equipment
Nuclear non-proliferation	All except NSG	Of significance for nuclear explosives
Missile technology	All except Canada	Of significance for missiles
Rwanda and Serbia & Montenegro	Rwanda and Serbia & Montenegro	Arms and related material[5]

[4] Chemical precursors: all except NATO, Argentina, Australia, Austria, Czech Republic, Finland, Hungary, Ireland, Japan, South Korea, New Zealand, Poland, Romania, Slovakia, Sweden, Switzerland; microorganisms and toxins: all except Canada; chemical and biological equipment: Country Group D:3 15 C.F.R § 740 Supplement 1.

[5] Items specified in 15 C.F.R §§ 746.8(b)(1)(ii) and 746.9(a).

TABLE 4-2
NLR, GBS, CIV, CTP, and LVS vs. 4A003

(LR[1] means license required; NLR means no license required[2])
(in the heading, NLR is limited to the effect of the Country Chart)
(in the body of the Table, NLR includes the effects of GBS, CIV, CTP, and LVS)

North Korea, Cuba, Libya, Iran, Iraq, Syria, Sudan, Serbia	LR for entire item
Canada:	NLR for entire item
All except Canada:	LR for MT portion
NATO less Iceland, Australia, New Zealand, Japan:	NLR entire item except MT
All except NATO less Iceland, Australia, New Zealand, Japan:	LR for CC portion
Remainder of Computer Tier 1 (Iceland, Austria, Brazil, Czech Republic, Finland, Holy See, Hungary, Ireland, Liechtenstein, Mexico, Monaco, Poland, San Marino, Sweden, Switzerland):	NLR except MT and CC
Computer Tier 2:	LR for MT, CC, and over 33,000 mtops; otherwise NLR

[1]LR would not be overcome by *de minimis* to Computer Tiers 3 or 4 if foreign-made computer exceeded 20,000 mtops and contained U.S.-origin controlled semiconductors (other than memory circuits) classified under ECCN 3A001 or high speed interconnect devices (ECCN 4A003.g), per 15 CFR 734.4(a).

[2]NLR might be overcome by an ITAR license requirement or by ECCNs 4A001 or 4A101.

TABLE 4-2 (CONTINUED)

Computer Tier 3 for 4A003.a-c:	
military end-use or end-user	
Country Group D:1[3]	LR for MT, CC, or over 6,500 mtops[4]
remainder of Tier 3:[5]	
>$5,000	LR for MT, CC, or over 6,500 mtops[4]
<$5,000	LR for MT, CC, or over 10,000 mtops[4]
civil end-use and end-user	LR for MT, CC, or over 20,000 mtops[4]
Computer Tier 3 for 4A003.d-g	
Country Group D:1[3]	
military end-use or end-user	LR
civil end-use and end-user	LR for d if 3-D vector rate 100M vectors/s or more; NLR for e and g
Remainder of Tier 3[5] less Serbia excluding Kosovo and less Taliban-controlled areas of Afghanistan	NLR

[3]Romania was moved from Tier 3 to Tier 2 on June 15, 2000.

[4]Prior notice over 12,500 effective August 14, 2000.

[5]Afghanistan areas not Taliban-controlled, Algeria, Andorra, Angola, Bahrain, Bosnia & Herzegovina, Comoros, Croatia, Djibouti, Egypt, India, Israel, Jordan, Kuwait, Lebanon, Macedonia (former Yugoslav Republic of), Mauritania, Morocco, Oman, Pakistan, Qatar, Saudi Arabia, Montenegro and Kosovo, Tunisia, United Arab Emirates, Vanuatu, Yemen.

TABLE 4-3
Matrix Churchill and FMI Questions

1. Why do U.S. ECCNs numbered to indicate that they are based on ML 18, namely 1B018 and 2B018, use obsolete wording which COCOM abandoned long ago?

    a. What is the meaning of "for" in ECCN 1B018, which covers equipment "for" the production of military explosives, omitting the COCOM (and Wassenaar) words "specially designed or modified" altogether?
    b. What is the meaning of "complete installations in ECCN 1B018.a?

        1. Is it intended to cover aggregations of otherwise uncontrolled equipment?
        2. What if the exporter supplies part, but not all, of a complete installation?
        3. Why did COCOM delete "complete installations" from earlier versions of ML 18?

    c. What are the meanings of "specialized" and "specially designed" in ECCN 2B018, which covers:

        Specialized . . . equipment . . . including but not limited to the following, that are specially designed for the . . . manufacture . . . of arms . . .

        1. Does "specialized" have the same meaning as "specially designed"?
        2. Why does 2B018 omit "or modified"?

2. Why does the Scott report overlook the words "or modified" in UK ML 18 and in COCOM and Wassenaar ML 18?

    a. Does "specially" qualify "modified" as well as "designed" in the expression "specially designed or modified"?
    b. Does "specially designed or modified" have the same meaning as "specially designed" (as the Scott report assumes)? or the same meaning as "designed or modified" which MTCR defines as ". . . fit for a particular application . . . can be used for other applications . . ."? or does it have yet another meaning?

TABLE 4-3 (CONTINUED)

3. What is the significance of COCOM and Wassenaar placing munitions production equipment on their Munitions Lists?

    a. Why does the United States include it on the CCL, rather than on the USML, even though the EU and the UK list it with Military Goods?
    b. Do Wassenaar, the EU, and the UK consider that it covers only equipment having no other use than to produce munitions, whereas the United States considers that it covers equipment that can be used for other applications?
    c. Why does the EU dual-use list include equipment to produce missile subsystems, missile propulsion equipment, or missile propellants (1B115, 7B103, 9B115, 9B116)?

        1. Is not equipment to produce such missile-related items a subset of ML 18?
        2. If not, does the EU consider that these MTCR items control dual-use equipment (usable to produce either munitions or non-munitions), whereas ML 18 applies only to equipment uniquely usable to produce munitions?
        3. Why does the United States apparently reach exactly the opposite conclusion, by putting missile production equipment on the USML while retaining munitions production equipment on the CCL?

4. What is meant by the MTCR term "production equipment," the definition of which includes "... machinery ... limited to those specially designed or modified for ... 'production' "?

    a. Since MTCR does not define "specially designed or modified", are MTCR definitions of "specially designed" or "designed or modified" relevant? If so, which one (they are mutually exclusive)?
    b. Why does the EU list not use the term "production equipment" in 1B115, since MTCR uses it in the corresponding MTCR item 5?

TABLE 4-3 (CONTINUED)

5. What is meant by the term "production facilities," the MTCR definition of which includes "equipment . . . integrated into installations for . . . 'production' "?

    a. Is "production facilities" intended to cover otherwise uncontrolled equipment integrated into production installations, whether or not the equipment, or the aggregation thereof, is "specially designed" (or "specially designed or modified") for the stated purpose?
    b. Would a license be required only if the exporter performed the integration? Or also if the importer performed the integration?
    c. Why does MTCR omit "production equipment" from MTCR item 1, thereby relying only on control of "production facilities" for "missiles"?

        1. Does "production facilities" omit anything included in "production equipment"? or
        2. If "production equipment" is a subset of "production facilities," why does MTCR use both terms in MTCR items 2, 3, and 20?

    d. Why does the EAR omit the MTCR definition of "production facilities," even though the term appears in quotation marks in ECCN 9B116?
    e. Why does ECCN 1B115 not include the term "production facilities"?

APPENDIX 4-1 Index to Commerce Control List

Subject	Export Control Classification Number
abradable	2E003.f
absorbers of electromagnetic waves	1C001
absorption columns, chemical processing	2B350.a.1.e
accelerators, pulsed electron	3A201.c
accelerometers	7A001
accelerometers	7A101
accelerometer axis align stations	7B003
accelerometer test station	7B003
acoustic beam forming software	6D003.a.1
acoustic data source code	6D003.a.2
acoustic equipment	6A001
acoustic equipment	6A991
acoustic signatures	1C101
acoustic signatures	1D103
acoustic vibration test equipment	9B006
acoustic wave devices	3A001.c
acoustic wave devices	3A991.g
acoustical ranging	2D992.a.2.c
actinide fluoride mass spectrometers	3A233.f
actinide mass spectrometers	3A233.f
active flight control	7E004.a.6
adaptive control	2B991.b.2.b
aero gas turbine engines	9A001
aero gas turbine engines	9A991.c
aero gas turbine engine test software	9D004.b
aerosol challenge testing, biological equipment	2B352.g
aflatoxins	1C351.d.11
African swine fever virus	1C352.a.1
agitators, chemical processing	2B350.a.1.b
air data based on surface data software	7D003.d.6
air data based on surface data technology	7E004.a.2
air-independent power systems	8A002.j
air traffic control software	6D003.h
aircraft, military, demilitarized	9A991.a
aircraft, military trainer	9A018.a
aircraft, non-military	9A991.b
aircraft parts and components	9A991.d
airlocks, nuclear plant	2A291.c
alexandrite	6C005.b

Subject	Export Control Classification Number
alkylphenylene ethers	1C006.b.1
alloyed materials	1C002.c
alpha-emitting radionuclides	1C236
altimeters, airborne	7A006
alumina fibers exception	1C010.c
aluminides	2E003.f
aluminides, nickel	1C002.a.1.a
aluminides, titanium	1C002.a.1.b
aluminum alloys	1C002.a.2.d
aluminum alloys	1C202.a
aluminum alloy powder	1C002.b.1.d
aluminum alloys direct-acting hydraulic pressing	2E003.b
aluminum alloys hot isostatic densification	2E003.b
aluminum alloys superplastic forming	2E003.b
aluminum, conversion to alumina fibers	1B001.d.4
aluminum diffusion bonding	1B003
aluminum fluoride	6C994.a
aluminum organo-metallic compounds	3C003.a
aluminum oxides	1E002.c.1.a.1
aluminum powder, spherical	1C111.a.1
aluminum pressure transducers	2B230
aluminum-silicon-polyester	2E003.f
aluminum superplastic forming	1B003
aluminum valves	2A226
ammonia synthesis	1B227
ammonium hydrogen fluoride	1C350.a.1
ammunition components	0A018.c
ammunition hand-loading equipment	0B986
amorphous alloy strips	1C003.c
amplification, optical	5A001.b.4.e.
amplifier tubes, crossed-field	3A001.b.1.b
amplifiers, microwave solid state	3A001.b.4
anaerobic chambers biological containment	2B352.f
analog-to-digital conversion computers	4A003.e
analog-to-digital integrated circuits	3A001.a.5
anechoic chambers	9B106.b
animal pathogens	1C352
anisotropic plasma dry etching equipment	3B001.c
antennae, phased array	5A001.e

Subject	Export Control Classification Number
antennae, phased array, for radar	6A008.e
antimony hydride	3C004
antimony organo compounds	3C003.b
aramid fibrous or filamentary materials	1C210.a
arc remelt and casting furnaces	2B227.a
argon arc light systems	8A002.g.2
argon ion lasers	6A205.a
arithmetic logic unit	3A001.a.3.a
armor, body	1A005
arms, discharge type	0A985
aromatic polyamide-imides	1C008.a.2
aromatic polyetherimides	1C008.a.4
aromatic polyimides	1C008.a.3
arsenic hydride	3C004
arsenic organo compounds	3C003.b
arsenic trichloride	1C350.a.2
Asynchronous Transfer Mode (ATM)	5A001.c.5
atomic frequency standards	3A002.g
Attitude Heading Reference Systems source code	7D002
Aujeszky's disease	1C352.a.6
autoclaves	1E103
automatic target tracking radar	6A008.l
Avian influenza virus	1C352.a.2
avionic equipment	7A994
avionic production equipment	7B994
avionic sensor data expert system source code	7D003.c
avionic test equipment	7B994
Bacillus anthracis	1C351.c.1
bacteria	1C351.c
bacteria	1C352.b
bacteria	1C354.a
balancing instrumentation	7B104.b
balancing machines	2B229
balancing machines	7B104.a
ball bearings	2A001
ball bearings	2A991
band-pass filters	3A001.b.5
band-stop filters	3A001.b.5

Subject	Export Control Classification Number
Bartonella quintana	1C351.b.1
basic gate propagation delay time	3A001.a.7.b
basic gate propagation delay time	3A001.a.10.b
batch mixers	1B117.a
batteries	3A001.e.1
batteries	3A991.h
bayonets	0A018.d
bearings	2A001
bearings	2A991
bellows-forming mandrels and dies	2B228.c
benzilic acid	1C350.a.3
beryllium	1C230
beryllium	2E003.f
beryllium beryllium substrate blanks	6C004.d
beryllium metal fuels	1C111.a.2
biological equipment	2B352
biphenylene	1C008.b.1
bismaleimides	1C008.a.1
bismuth	1C229
Bluetongue virus	1C352.a.3
boats	8A992.f
body armor	1A005
boilers, marine	8A018.b.4
borides	2E003.f
borides, tantalum crucibles	2A225.c
borides, titanium	1C007.a, b
boron	1C011.b
boron	1C225
boron carbide	1C011.b
boron carbide	1E002.c.1.a.3
boron carbide or nitride	1C007.d
boron fibers exception	1C010.c
boron metal fuel	1C111.a.2
boron nitride	1E002.c.1.a.2
boron nitride	2E003.f
bottom or bay cable equipment	6A001.a.2.e
bottom or bay cable software	6D003.a.3
Botulinum toxins	1C351.d.1

Subject	Export Control Classification Number
breathing equipment for use in aircraft	9A991.e
breathing equipment for use in military aircraft	9A018.d
Brucella abortus	1C351.c.2
Brucella melitensis	1C351.c.3
Brucella suis	1C351.c.4
Burkholderia mallei	1C351.c.5
Burkholderia pseudomallei	1C351.c.6
butacene	1C111.c.1
cadmium telluride	6C002.b
cadmium zinc telluride	6C002.b
calcium	1C227
calcium fluoride crucibles	2A225.a.1
calcium zirconate crucibles	2A225.a.2
cameras	6A003
cameras	6A203
cameras, low light level television	8A002.d.1.c
cameras, still, underwater use	8A002.e
cameras, underwater	8A992.a.2.b
cameras, underwater television	8A002.d.1.b
camming, machine tool	2B991.d.1.b
camming, machine tool	2B992.a.3,b.1
cannon, water	0A989
canopies	9A992
capacitors	3A001.e.2
capacitors	3A201.a
carbides	2E003.f
carbides, silicon/boron	1E002.c.1.a.3
carbides, silicon/zirconium/boron	1C007.d
carbides, tantalum crucibles	2A225.c
carbon-carbon	2E003.f
carbon-coated fibers	1C010.e
carbon dioxide lasers	6A005.a.4
carbon dioxide lasers	6A205.d
carbon fiber preforms	1C010.e
carbon fibrous or filamentary materials	1C010.b, d.2
carbon fibrous or filamentary materials	1C210.a
carbon in maraging steels	1C116
carbon monoxide lasers	6A005.a.3
carboxy-terminated polybutadiene (CTPB)	1C111.b.1

Subject	Export Control Classification Number
cargo aircraft	9A991.a.1
casks to transport radioactive material	2A291.b
catalysts, platinized	1A225
cathode arc discharge	2E003.f
cathodes	3A001.b.1
cathodes, impregnated	3A001.b.1.c
cedar, Western red	1C988
cellular radio software	5D001.c.1
cellular radio technology	5E001.b.7
cemented tungsten carbide	2E003.f
centralized network control	5A991.d
centralized network control	5E001.b.6
centrifugal balancing machines	2B229
centrifuge fixtures for gyro bearings	7B003
ceramic base materials	1C007
ceramic materials	1C107.b
ceramic matrix composites	2E003.f
ceramics chemical incinerators	2B350.d.3
ceramics chemical pumps	2B350.c.9
cerium sulfide crucibles	2A225.a.3
certify information security software	5D002.c.2
chemical agents	1A984
chemical lasers	6A005.a.5
chemical manufacturing facilities	2B350
chemical processing equipment	2B350.a
chemical vapor deposition	1B001.d.2
chemical vapor deposition	1B101.c.2
chemical vapor deposition	2E003.f
chemical vapor deposition furnaces	2B104.b
chemical vapor deposition, plasma enhanced	3B001.d
chemical vapor deposition, plasma enhanced	3B991.b.1.i
Chikungunya virus	1C351.a.1
Chlamydia psittaci	1C351.c.7
chlorine detection	2B351.a
chlorine trifluoride	1C238
chloroethanol	1C350.a.4
chlorofluorocarbons	1C006.a.2
cholinesterase-inhibiting activity	2B351.b
chromium	2E003.f

Subject	Export Control Classification Number
chromium, alloy steel	2A292
chromium chemical filling equipment	2B350.b.2
chromium chemical incinerators	2B350.d.2
chromium chemical processing equipment	2B350.a.2.b
chromium chemical pumps	2B350.c.2
clock frequency	3A001.a.3.b
Clostridium botulinum	1C351.c.8
Clostridium perfringens toxins	1C351.d.2
coating	2E003.f
coating equipment	2B005
coating optical surface technology	6E003.d.1
coating underwater optical fiber technology	5E001.b.3
Cochliobolus miyabeanus	1C354.b.2
cold-cathode tubes	3A228.a
Colletotrichum coffeanum var. virulans	1C354.b.1
columbium	2E003.f
comminution	1C002.b.2.e
comminution	1C002.b.2.f
common channel signalling	5B001.b
common channel signalling	5E001.c
communication intercepting devices	5A980
communication interconnection, computers	4A003.g
composite conductors, superconductive	1C005
composite structures	1A002
composite structures	9A110
composite structures, tubular	1A202
composite structure production equipment	1B001
composite structure production equipment	1B101
composite theoretical performance	4A003.b, c
composite theoretical performance	4A994.b
composites	1E103
compound rotary tables	2B008.c
compound semiconductor	3A001.a.4.c
computer-aided-design	2B991.b.3
computer monitors	4A994.h
computers, digital	4A003
computers, fingerprint	4A980
computers, hybrid	4A002
computers, information security	4A001.b

Subject	Export Control Classification Number
computers for use in missiles	4A101
computers, neural	4A004.b
computers, optical	4A004.c
computers, radiation-hardened	4A001.a.2
computers, systolic array	4A004.a
computers, temperature rated	4A001.a.1
conductive polymers	1C001
conductors, superconductive composite	1C005
Congo-Crimean haemorrhagic fever virus	1C351.a.2
Conotoxin	1C351.d.3
construction equipment	0A018.b
containment biological equipment	2B352.a, f
continuous mixers	1B117.b
continuous mixers for solid propellants	1B018.a.2
contouring control	2B991.a
contouring control	2B991.c
controlled environment induction furnaces	2B226
converters, microwave	3A001.b.7
converting aluminum into alumina fibers	1B001.d.4
converting polymeric fibers	1B101.c.1
converting polymeric into carbon fibers	1B001.d.1
copolymers, thermoplastic liquid crystal	1C008.b
copolymers, thermoplastic liquid crystal	1C010.d.1.b
copolymers, thermoplastic liquid crystal	1C010.d.2
copper based matrix	1C004
copper-nickel alloy	2A292
correlation velocity sonar log	6A001.b
corrosion resistant steel	2E003.f
coupled cavity tubes	3A001.b.1.a.3
Coxiella burnetii	1C351.b.2
crime science laboratories, mobile	9A980
crossed-field amplifier tubes	3A001.b.1.b
crucibles	2A225
crude petroleum	1C981
cryocoolers	6A002.d
cryptanalytic	5A002.a.2
cryptography analog techniques	5A002.a.3
cryptography digital techniques	5A002.a.1
crystal pullers	3B991.b.1.c

Subject	Export Control Classification Number
custom integrated circuits	3A001.a.10
cyanogenosin	1C351.d.4
data (message) switching equipment	5A991.c.1
datagram packets	5A991.c.3
dehydration presses	1B018.a.2
Dengue fever virus	1C351.a.3
densification equipment	2B104
depleted uranium	1A290
detect surreptitious intrusion	5A002.a.7
detection devices, underwater	6A018
detection of explosives	2A993
detectors, radiation-hardened	6A102
detectors, toxic gas	2B351
detonation cords	1C998
detonators	3A232
development of machine tool instructions	2E003.d
diagnostic equipment for lasers	6A005.f.2
diamond-like carbon	2E003.f
diamond material, synthetically produced	6C004.fg
dibromotetrafluoroethane	1C006.c.1
dielectric layers	2E003.d
dies, bellows-forming	2B228.c
diesel engines	9A990
diesel engines, nonmagnetic	8A018.b.3
diesel engines for submarines	8A018.b.1
diesel engine technology	9E003.e
diethyl ethylphosponate	1C350.a.5
diethyl methylphosphonite	1C350.a.6
diethyl-N,N-dimethylphosphoroamidate	1C350.a.7
diethyl phosphite	1C350.a.8
diethylene glycol dinitrate (DEGDN)	1C111.c.5
diffusion bonding	1B003
diffusion bonding	2E003.b
digital computers	4A003
digital integrated circuits	3A001.a.11
digital-to-analog integrated circuits	3A001.a.5
digitizers, waveform	3A002.a.5

Subject	Export Control Classification Number
diisopropylamine	1C350.a.14
dimensional inspection assemblies	2B008
dimensional inspection machines, manual	2B996
dimensional inspection or measuring systems	2B006
dimensional inspection or measuring systems	2B206
dimethyl ethylphosphonate	1C350.a.15
dimethyl hydrogen phosphite	1C350.a.17
dimethyl methylphosphonate	1C350.a.16
dimethyl phosphite	1C350.a.17
dimethylamine	1C350.a.18
dimethylamine hydrochloride	1C350.a.19
dinitrogen pentoxide	1C111.a.3.c
dinitrogen tetroxide	1C111.a.3.b
dinitrogen trioxide	1C111.a.3.a
direct-acting hydraulic pressing	2E003.b
direct view imaging equipment	6A002.c
direction finding, airborne, software	7D003.d.5
direction finding, airborne, technology	7E004.a.1
directional solidification software	9D004.c
discharge type arms	0A985
disk drives	4A994.d.1
disk drive technology	4E993.c
disposal of chemicals	1E351
disposal of microbiological materials	1E351
distillation columns, chemical processing	2B350.a.1.e
distillation columns, hydrogen-cryogenic	1B228
doppler laser interferometers	6A225
doppler signal processing radar	6A008.g
Dothidella ulei	1C354.b.3
dry boxes biological containment	2B352.f
dye lasers	6A005.d
dye laser amplifiers	6A205.c
dye oscillators	6A205.b
dynamic adaptive routing	5A001.c.2
dynamic adaptive routing	5D001.c.4
dynamic wavefront measuring equipment	6A005.f.1
Eastern equine encephalitis virus	1C351.a.4

Subject	Export Control Classification Number
Ebola virus	1C351.a.5
Eddy current test equipment	0B008.b
EEPROMs	3A001.a.4
EEPROMs	3A991.b
elastomers, fluorinated phosphazene	1C009.c
electric motors for submarines	8A018.b.2
electrical discharge machines (EDM)	2B001.d
electrical discharge machines (EDM)	2B991.d.2
electrically erasable programmable read-only memories	3A001.a.4
electro-optical integrated circuits	3A001.a.6
electrolytic cells for fluorine production	1B225
electromagnetic interference technology	7E102
electromagnetic pulse, telecommunications	5A001.a.1
electromagnetic pulse technology	7E102
electromagnets, superconducting solenoidal	3A201.b
electromagnets, superconductive	3A001.e.3
electromagnets, superconductive	3A991.i
electron beam	2E003.f
electron beam machine tools	2B001.c.4.a.2
electron beam melting furnaces	2B227.b
electron beam semiconductor test equipment	3B002.d
electron beam test systems	3B991.b.9
electron bombardment mass spectrometers	3A233.d
electron tube manufacturing or testing equipment	3B991.a
electronic monitoring restraint devices	3A981
electronic test equipment	3A992.a
electronic vacuum tubes	3A001.b.1
end-effectors for robots	2B007
end effectors for robots	2B207
engine flow modelling software	9D004.a
environmental chambers	1B018.b
environmental chambers	9B106.a
epitaxial growth	3B001.a
epitaxial growth	3B991.b.1.d
epitaxial growth, molecular beam	3B991.b.1.e
epoxy resins	1C010.e.2.d

Subject	Export Control Classification Number
erbia crucibles	2A225.a.4
erbium oxide crucibles	2A225.a.4
etching equipment, anisotropic plasma dry	3B001.c
etching equipment, anisotropic	3B991.b.1.h
0-ethyl-2-diisopropylaminoethyl methylphosponite	1C350.a.20
ethylphosphinyl dichloride	1C350.a.21
ethylphosphinyl difluoride	1C350.a.22
ethylphosphonous dichloride	1C350.a.21
ethylphosphonous difluoride	1C350.a.22
ethylphosphonyl dichloride	1C350.a.23
ethylphosphonyl difluoride	1C350.a.24
exchange tray columns, water-hydrogen sulfide	1B229
excimer lasers	6A005.a.1
exoatmosphere communications technology	5E001.b.2
expert numerical control systems	2E003.e
expert system avionics sensor data source code	7D003.c
expert system software	4D003.b
exploding bridge	3A232.a.1
exploding bridge wire	3A232.a.2
exploding foil initiator	3A232.a.4
explosive detection systems	2A993
explosive detonator firing sets	3A229.a
explosives, high	1C239
explosives production	1B018
extrusion presses	1B018.a.2
fabric-lined journal sliding bearings	2A991.e
fabric-lined self-aligning bearings	2A991.e
fast select packets	5A991.c.4
Fast Fourier Transform	3A001.a.12
Fast Fourier Transform	6A001.a.2.c
fault detection, tolerance or isolation	7E004.b.3
fault tolerant computers	4A003.a
fault tolerant flight control software	7D003.d.4
fermenters, biological	2B352.b
ferrosilicon chemical pumps	2B350.c.10
fiber optic (also see optical fiber)	
fiber optic hull penetrators or connectors	8A002.c

Subject	Export Control Classification Number
fiber optic intrinsic magnetic gradiometers	6A006.e
fiber optic magnetometers	6A006.c
fibrous or filamentary materials	1C010
fibrous or filamentary materials	1C210
fibrous or filamentary materials	1C990
field programmable gate arrays	3A001.a.7
field programmable logic arrays	3A001.a.8
field programmable logic arrays	3A992.c
filament winding machines	1B001.a
filament winding machines	1B101.a
filament winding machines	1B201
filling equipment, chemical manufacturing	2B350.b
film type integrated circuits	3A001.a
filters for semiconductor manufacture	3B991.b.8
filters, tunable band-pass or band-stop	3A001.b.5
filtration, biological	2B352.d
fingerprint analyzers	3A981
fingerprint computers	4A980
fingerprinting powders, dyes and inks	1A984
firearms, muzzle-loading	0A018.e
firing sets, explosive detonator	3A229.a
fittings, nickel or chromium	2A292
flash X-ray generators	3A201.c
flexible waveguides	3A992.e
flight control optical sensor array	7E004.a.6
flight control technology	7E004.b
flight path optimization software	7D003.d.1
flight trainers	9A018.f
flow-forming machines	2B009
flow-forming machines	2B109
flow-forming machines	2B209
fluoride fiber cable	6A994.b
fluoride, calcium crucibles	2A225.a.1
fluoride, vinylidene	1C009.a
fluorides of zirconium or hafnium	6C004.e
fluorinated compound components	1A001
fluorinated phosphazene elastomers	1C009.c
fluorinated polyimides	1C009.b

Subject	Export Control Classification Number
fluorine detection	2B351.a
fluorine production	1B225
fluoroelastomer compounds	1E002.b
fluorophosphate glass	6C004.e
fluoropolymers chemical processing equipment	2B350.a.2.c
fluoropolymers chemical pumps	2B350.c.3
fluxgate magnetometer technology	6E003.f
fly-by-wire or fly-by-light software	7D003.d.3
fly-by-wire or fly-by-light technology	7E004.b
fly-by-wire or fly-by-light technology	7E004.c.1
foam, syntactic, for underwater use	8C001
focal plane arrays	6A002.a.3
focal plane array cameras	6A003.b.4
foil bearings, gas-lubricated	2A991.c
Foot and mouth disease virus	1C352.a.4
force measurement	2D992.a.2.f
framing cameras	6A003.a.4
framing cameras	6A203.a.1
framing tubes for cameras	6A203.b.3
Francisella tularensis	1C351.c.9
free electron laser manufacturing equipment	6B995
free electron lasers	6A005.e
freeze drying biological equipment	2B352.e
frequency agility	5A001.b.3
frequency agility	5A002.a.5
frequency agility radar techniques	6A008.h.2
frequency changers	3A225
frequency converters	3A225
frequency generators	3A225
frequency inverters	3A225
frequency standards, atomic	3A002.g
frequency synthesized signal generators	3A002.d
frequency synthesizer assemblies	3A002.b
friction measurement, wall skin	9B008
fuel inspection equipment, nuclear plant	2A291.c
full authority digital engine control software	9D003
fungi	1C354.b
furnaces, arc remelt and casting	2B227.a

Subject	Export Control Classification Number
furnaces, chemical vapor deposition	2B104.b
furnaces, electron beam melting	2B227.b
furnaces, induction	2B226
furnaces, plasma atomization and melting	2B227.b
fused aluminides	2E003.f
fused silica	6C004.e
fused silicides	2E003.f
gallium arsenide photocathode	6A002.a.2.
gallium, hetero-epitaxial	3C001.c
gallium indium arsenide photocathode	6A002.a.2.
gallium organo-metallic compounds	3C003.a
gas atomization	1C002.b.2.b
gas discharge lasers	6A005.a.6
gas lasers	6A005.a
gas turbine component solid state joining	9B004
gas turbine engine assemblies and components	9A003
gas turbine engine brush seal production	9B003
gas turbine engine component tooling	9B001
gas turbine engine component tooling	9B991
gas turbine engine development systems	9B002
gas turbine engine technology	9E003.a
gas turbine engine component technology	9E003.c
gas turbine engines, aero	9A001
gas turbine engines, aero	9A991.c
gas turbine engines, marine	9A002
gas-lubricated foil bearings	2A991.c
gate arrays, field programmable	3A001.a.7
gear cutting machine tools	2B003
gearmaking machinery	2B993
generators, electric, portable	2A994
generators for nuclear plants	2A290
genetically modified microorganisms	1C353
germanium, hetero-epitaxial	3C001.b
glass	6C004.f
glass chemical processing equipment	2B350.a.2.d
glass chemical pumps	2B350.c.4
glass fibrous or filamentary materials	1C210.b
glove boxes biological containment	2B352.f
glow discharge mass spectrometers	3A233.b

Subject	Export Control Classification Number
Goat pox virus	1C352.a.5
gradiometers, magnetic	6A006.d
graphics accelerators or graphics coprocessors	4A003.d
graphics accelerators or graphics coprocessors	4A994.g
graphics, interactive, numerical control	2E003.a
graphite	1C107.a
graphite chemical processing equipment	2B350.a.2.e
graphite chemical pumps	2B350.c.5
gravimeter motional influence correction software	6D003.g
gravimeters	6A007
gravimeters, ground use	6A997
gravity gradiometers	6A007.c
gravity gradiometer components	6A107
gravity meters	6A007
gravity meters, ground use	6A997
gravity meter components	6A107
gravity meter production equipment	6B007
guanidine nitrate	1C011.c
gun systems, high velocity	2B232
gyros	7A002
gyros	7A102
gyros, ring laser, mirror characterization	7B002
gyro-astro compasses	7A004
gyro-astro compass components	7A104
gyro dynamic balance stations	7B003
gyro evacuation and fill stations	7B003
gyro run-in/motor test stations	7B003
gyro tuning test stations	7B003
hafnia crucibles	2A225.a.5
hafnium	1C231
hafnium fluoride	6C004.e
hafnium oxide crucibles	2A225.a.5
handcuffs	0A982
Hantaan virus	1C351.a.6
harnesses	9A992
head/disk materials	4C994
heading sensors	6A001.a.2.d
heat exchangers, chemical processing	2B350.a.1.d
heavy water separation packings	1A226

Subject	Export Control Classification Number
helicopter power transfer system technology	9E003.d
helicopter system technology	7E004.c
helium-3	1C232
helix tubes	3A001.b.1.a.4
helix tubes	3A991.e.2
helmets, military	0A018.f
helmets, military	0A988
helmets, police	0A982
Helminthosporium oryzae	1C354.b.2
Herpes virus	1C352.a.6
hetero-epitaxial materials	3C001
high density digital recording (HDDR)	3A002.a.1
high energy devices	3A001.e
high temperature bearing steels	2E003.f
HMX	1C992.a.1
HNS	1C992.a.1
Hog cholera virus	1C352.a.7
hole drilling gas turbine engine technology	9E003.c
horses by sea	0A980
hot isostatic densification	2E003.b
hot isostatic presses	2B004
hot melt prepreg production	1B001.e
hull penetrators, fiber optic	8A002.c
human pathogens	1C351
hybrid computers	4A002
hybrid integrated circuits	3A001.a
hydrides of phosphorus, arsenic, or antimony	3C004
hydrocarbon impregnation	2B004.b.3
hydrocarbon oils, synthetic	1C006.a.1
hydroclaves	1E103
hydrofoil vessels	8A001.h
hydrofoils	8A002.m
hydrogen-cryogenic distillation columns	1B228
hydrogen fluoride	1C350.a.25
hydrophone array data source code	6D003.a.2
hydrophones	6A001.a.2.a
6-hydroxy-2 naphthoic acid	1C008.b.2.b
4-hydroxybenzoic acid	1C008.b.2.c

Subject	Export Control Classification Number
hydroxy-terminated polybutadiene (HTPB)	1C111.b.2
3-hydroxyl-1-methylpiperidine	1C350.a.26
image enhancement	4A994.f
image intensifier cameras	6A003.b.3
image intensifier tubes	6A002.a.2
image intensifier tubes	8A002.d.1.c.1
image intensifier tubes, proximity focussed	6A203.b.3.a
imaging devices for cameras, solid state	6A203.b.3
imaging equipment, direct view	6A002.c
imaging sensors	6A002.b
imaging systems, underwater use	8A002.f
impregnated cathodes	3A001.b.1.c
incinerators, to destroy chemicals	2B350.d
indicator heads	7B104.b
indium, hetero-epitaxial	3C001.c
indium organo-metallic compounds	3C003.a
induction coil magnetometers	6A006.b
induction furnaces	2B226
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inertial measurement unit tester	7B003
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information security equipment	5A992
information security computers	4A001.b
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information security measurement equipment	5B002.b
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infrared imaging	2D992.a.2.b
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Subject	Export Control Classification Number
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Integrated Services Digital Network (ISDN)	5A991.c.2
Integrated Services Digital Network (ISDN)	5E001.b.8
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ion assisted resistive heating	2E003.f
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ion implantation	3B001.b
ion implantation	3B991.b.1.g
ion lasers	6A005.a.6
ion plating	2E003.f
iron based matrix	1C004
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Japanese encephalitis virus	1C351.a.7
Junin virus	1C351.a.8
Kerr shuttering	6A203.b.3.c
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ketones, polyarylene	1C010.d.1.b
ketones, polyarylene	1C010.d.2

Subject	Export Control Classification Number
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ketones, polyarylene ether	1C010.d.1.b
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laminates	1A002
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lasers	6A205
laser beam machine tools	2B001.e.1.c
laser diagnostic equipment	6A005.f.2
laser diagnostic technology	6E003.e
laser diodes	3A001.a.6.a
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laser gyro mirror characterization	7B002
laser gyro mirror characterization	7B102
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laser optical filter technology	6E993.b
laser radar	6A008.j
laser water jet gas turbine engine technology	9E003.c
Lassa fever virus	1C351.a.9
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lead selenide focal plane array exception	6A002.a.3
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lithium tantalate focal plane array exception	6A002.a.3
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Lymphocytic choriomeningitis virus	1C351.a.10
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Machupo virus	1C351.a.11
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magnesium alloy powder	1C002.b.1.e
magnesium alloys	1C002.a.2.e
magnesium metal fuels	1C011.a
magnesium metal fuels	1C111.a.2
magnesium oxide crucibles	2A225.a.6
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magnetic bearing systems	2A001.c
magnetic bearing systems	2A991.d
magnetic compensation systems	6A006.g
magnetic compensation software	6D003.f.1
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magnetic metals	1C003
magnetometers	6A006
magnetometers	6A996
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maraging steels	1C216
Marburg virus	1C351.a.12
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marine gas turbine engines	9A002
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masks	3B991.b.2.a
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mask substrates	3B991.b.2.b
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Subject	Export Control Classification Number
materials	xCxxx
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melt spinning	1C002.b.2.e,c
mercury cadmium telluride	6C002.b
metal alloys	1C002.a
metal alloy powder	1C002.b
metal alloy production systems	1B002
metal coated fiber preforms	9A110
metal coated fibers	1C010.e
metal fuels	1C111.a.2
metal matrix composites	2E003.f
metal vapor lasers	6A005.a.2
metazirconate crucibles	2A225.a.2
methyl benzilate	1C350.a.27
methylphosphinyl dichloride	1C350.a.28
methylphosphinyl difluoride	1C350.a.29
methylphosphonous dichloride	1C350.a.28
methylphosphonous difluoride	1C350.a.29
methylphosphonyl dichloride	1C350.a.30
methylphosphonyl difluoride	1C350.a.31
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microcontroller microcircuits	3A001.a.3
Microcyclus ulei	1C354.b.3
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microprocessor microcircuits	3A992
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Subject	Export Control Classification Number
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Monkey Pox virus	1C351.a.13
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Subject	Export Control Classification Number
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Naval Petroleum Reserves	1C983
Naval Petroleum Reserves	1C984
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navigation production equipment	7B994
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nickel chemical incinerators	2B350.d.2
nickel chemical processing equipment	2B350.a.2.a
nickel chemical processing equipment	2B350.a.2.b
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nickel chemical pumps	2B350.c.2
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Subject	Export Control Classification Number
niobium alloys	1C002.a.2.b
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nitrided niobium-titanium-tungsten alloy	2A225.a.7
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2-nitrodiphenylamine	1C111.c.3
nitrogen dioxide	1C111.a.3.b
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N,N-diethylethanolamine	1C350.a.9
N,N-diisopropyl.2-aminoethyl chloride hydrochloride	1C350.a.11
N,N-diisopropylbeta-aminoethanethiol	1C350.a.10
N,N-diisopropylbeta-aminoethanol	1C350.a.12
N,N-diisopropylbeta-aminoethyl chloride	1C350.a.13
noble metal modified aluminides	2E003.f
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non-destructive inspection equipment	1B001.f
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nozzles for pyrolitically derived materials	1B116
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Subject	Export Control Classification Number
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optical computers	4A004.c
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optical fabrication technology	6E993.a
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optical fiber preforms	6C994.b
optical filter technology	6E993.b
optical integrated circuits	3A001.a
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optical ranging	2D992.a.2.a
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optical sensing fibers	6C990
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optical sensors	6A992
optical surface coating technology	6E003.d.1
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optics	6A994
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organo-metallic compounds	3C003.a
oscilloscopes	3A292
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Subject	Export Control Classification Number
oxide, hafnium crucibles	2A225.a.5
oxide, magnesium crucibles	2A225.a.6
oxide, yttrium crucibles	2A225.a.8
oxide, zirconium crucibles	2A225.a.9
oxides, zirconium/silicon/aluminum	1E002.c.1.a.1
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perforators, oil well	1C992
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Peste des petits ruminants virus	1C352.a.10
PETN	1C992.a.1
petroleum products	1C982
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phenolic resins	1C010.e.2.d
phenylene	1C008.b.1
phenylene ethers	1C006.b.1
phosphate glass	6C004.e
phosphazene elastomers, fluorinated	1C009.c
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phosphorus pentachloride	1C350.a.33
phosphorus pentasulfide	1C350.a.34
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pinacolyl alcohol	1C350.a.37
piping, chemical processing	2B350.a.1.g

Subject	Export Control Classification Number
piping, nickel or chromium	2A292
pitch impregnated fibers	1C010.e
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plasma-enhanced CVD equipment	3B991.b.1.i
plasma mass spectrometers	3A233.a
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platinum	2E003.f
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polyarylene ether ketones	1C010.d.1.b
polyarylene ether ketones	1C010.d.2
polyarylene ketones	1C008.d
polyarylene ketones	1C010.d.1.b
polyarylene ketones	1C010.d.2
polyarylene sulphides	1C008.e
polyarylene sulphides	1C010.d.1.b
polyarylene sulphides	1C010.d.2
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polybenzoxazoles	1E002.a
polybiphenylenethersulphone	1C008.f
polybiphenylenethersulphone	1C010.d.1.b
polybiphenylenethersulphone	1C010.d.2
polybromotrifluoroethylene	1C006.c.3
polybutadiene-acrylic acid (PBAA)	1C111.b.3
polybutadiene-acrylic acid acrylonitrile (PBAN)	1C111.b.4
polycarbosilazanes	1C007.e.3
polychlorotrifluoroethylene	1C006.c.2
polycrystalline silicon production equipment	3B991.b.1.a
polydiorganosilanes	1C007.e.1
polyester, aluminum-silicon-	2E003.f
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polyethylene exception	1C010.a, d.2
polygraphs	3A981
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polymers, intrinsically conductive	1C001
polymeric fibers conversion	1B101.c.1
polysilazanes	1C007.e.2
polyvinylidene fluoride focal plane array exception	6A002.a.3
Porcine enterovirus type 9	1C352.a.11
portable electric generators	2A994
position encoders, rotary input	3A001.f
positioning accuracies, machine tool	2B001.c.1.b.5
positioning accuracy, machine tool	2B001
positioning accuracy, machine tool	2B992.a.1
positioning tables	7B104.d
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potassium cyanide	1C350.a.38
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potassium hydrogen fluoride	1C350.a.40
potassium titanyl arsenate	6C004.b.1
power supplies, direct current high-power	3A226
power supplies, direct current high-voltage	3A227
power systems, air-independent	8A002.j
precursor chemicals	1C350
precursor chemicals	1C995
preforms	1C010.e
preforms	9A110
preforms, optical fiber	6C994.b
prepregs	1C010.e
prepregs	9A110
prepreg production	1B101.d
prepreg production by hot melt	1B001.e
pressure refuelers	9A018.c
pressure sensors	6A226
pressure transducers	2B230
pressurized aircraft breathing equipment	9A018.d
pressurized aircraft breathing equipment	9A991.e
primary flight control	7E004.a.5
propellants	1C111
propellants, liquid, production	1B115
propellants, solid, production	1B018
propellants, solid, production	1B117
propeller blade technology	9E003.b.2

Subject	Export Control Classification Number
propeller noise reduction	8D002
propeller noise reduction	8E002.a
propeller, water screw	8A002.o
propulsion and flight control software	7D003.d.2
Pseudomonas mallei	1C351.c.5
Pseudomonas pseudomallei	1C351.c.6
psychological stress analysis	3A981
Puccinia glumarum	1C354.b.5
Puccinia graminis	1C354.b.4
Puccinia graminis f. sp. tritici	1C354.b.4
Puccinia striiformis	1C354.b.5
pulse, electromagnetic, technology	7E102
pulse compression radar	6A008.k
pulse generators, high speed	3A230
pulse generators, modular electrical	3A229.b
pulse radar cross section measurement systems	6B008
pulsed electron accelerators	3A201.c
pumpjet propulsion systems	8A002.p
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Pyricularia grisea	1C354.b.6
Pyricularia oryzae	1C354.b.6
pyrolytically derived materials	1E104
pyrolitically derived materials, nozzles for	1B116
pyrolysis equipment	2B104
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PYX	1C992a.1
Quadrature Amplitude Modulation (QAM)	5B001.b
Quadrature Amplitude Modulation (QAM)	5D001.d
Quadrature Amplitude Modulation (QAM)	5E001.c
quartz pressure transducers	6A226.b
quinuclidinol	1C350.a.41
quinuclidinone	1C350.a.42
radar	6A008
radar	6A108.a
radar, airborne	6A998
radar cross section measurement	6B108

Subject	Export Control Classification Number
radar pulse cross section measurement systems	6B008
radar reflectivity	1C101
radar reflectivity	1D103
radiation shielding windows	1A227
radiation-hardened computers	4A001.a.2
radiation-hardened computers	4A101.b
radiation-hardened detectors	6A102
radiation-hardened integrated circuits	3A001.a.1
radiation-hardened telecommunications	5A001.a.2
radiation-hardened TV cameras	6A203.c
radio relay communications equipment	5A991.g
radioactive material transport casks	2A291.b
radionuclides, alpha-emitting	1C236
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Raman shifters	6A205.e
raster-type head-up display software	7D003.d.7
raster-type head-up display technology	7E00R.a.3
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RDX	1C992.a.1
reaction vessels, chemical processing	2B350.a.1.a
real-time processing	2B991.b.2
real time processing software	4D003.d
rebreathing apparatus, underwater	8A018.a
receivers, microwave test	3A002.f
reciprocating diesel engine technology	9E003.e
recording equipment	3A002.a
reduced observables	1C101
reduced observables	1D103
reflectance measuring equipment	6B004.a
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refractory materials, wet-spinning	1B001.d.3
refractory materials, wet-spinning	1B101.c.3
refractory metals	2E003.d
refuelers, pressure	9A018.c
release mechanisms	9A992
remote manipulators	2B225
remote manipulators, submersible use	8A002.i
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Subject	Export Control Classification Number
resin impregnated fibers	1C010.e
resin impregnated fiber prepregs	9A110
resist materials	3C002
restraint devices, electronic monitoring	3A981
reticles	3B001.g
Ricin	1C351.d.5
Rickettsia prowasecki	1C351.b.3
Rickettsia quintana	1C351.b.1
Rickettsia rickettsii	1C351.b.4
Rickettsiae	1C351.b
Rift Valley fever virus	1C351.a.14
rigid magnetic media coating equipment	4B994.a
rigid magnetic media heads production equipment	4B994.c
rigid magnetic media test equipment	4B994.b
Rinderpest virus	1C352.a.12
ring laser gyro mirror characterization	7B002
robots	2B007
robots	2B207
robots	2B997
robots, underwater use	8A002.h
robot assemblies	2B008
Rochalimea quintana	1C351.b.1
rocket motor inspection equipment	9B007
rocket motor test equipment	9B117
rocket propellant test equipment	9B117
roller bearings	2A001
rotary atomization	1C002.b.2.c
rotary input position encoders	3A001.f
rotary position feedback units	2B008.b
rotating mirror cameras	6A203.a
rotor assembly equipment	2B228.a
rotor blade technology	7E004.c.3
rotor blade tip clearance software	9D004.d
rotor straightening equipment	2B228.b
ruggedized computers	4A101.b
run-out, machine tool	2B991.d.1.c
run-out, machine tool	2B992.a.3,b.1
Russian Spring-Summer encephalitis virus	1C351.a.15
Salmonella typhi	1C351.c.10

Subject	Export Control Classification Number
salvage systems, ocean	8A001.e
sapphire, titanium doped	6C005.a
satellite communications technology	5E001.b.1
Saxitoxin	1C351.d.6
scanning cameras	6A003.b.2
scuba gear	8A992.h
sea-induced motion control systems	8A002.n
search lights	0A018.a
semiconductor analysis	3B991.b.4
semiconductor compound	3A001.a.4.c
semiconductor computer-aided-design software	3D003
semiconductor interconnection manufacture	3B991.b.1.l
semiconductor lasers	6A005.b
semiconductor processing equipment	3B991.b.1.b
semiconductor test equipment	3B002
semiconductor test equipment	3B991.b.7
sensor data, avionics, expert system source code	7D003.c
sensor window materials	2E003.f
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Sheep pox virus	1C352.a.13
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Shiga toxin	1C351.d.7
Shigella dysenteriae	1C351.c.11
shotguns	0A984
shotgun optical sighting devices	0A985
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shotgun shell manufacturing equipment	0B986
sighting devices, optical, for firearms	0A985
signal analyzers	3A002.c
signal generators, frequency synthesized	3A002.d
signal processing	3A001.a.6
signal processing	3A001.c.3
signal processing	4A994.f
signal processing	5A001.b.5
signatures, ultraviolet/infrared/acoustic	1C101
signatures, ultraviolet/infrared/acoustic	1D103
silahydrocarbon oils	1C006.a.1
silica, fused	6C004.f
silicides	2E003.f

Subject	Export Control Classification Number
silicon carbide	1C107.b
silicon carbide	2E003.f
silicon carbide substrate	3E002.f
silicon carbides	1E002.c.1.a.3
silicon carbides or nitrides	1C007.d
silicon carbide substrate blanks	6C004.d
silicon fiber reinforced ceramic materials	1C007.c
silicon focal plane array exception	6A002.a.3
silicon, hetero-epitaxial	3C001.a
silicon intensifier target (SIT)	6A203.b.3.b
silicon nitrides	1E002.c.1.a.4
silicon on insulator substrate	3E002.e
silicon on sapphire integrated circuits	3A001.a
silicon oxides	1E002.c.1.a.1
silver gallium selenide	6C004.b.2
simulators, nuclear reactor	0B008
single crystal casting software	9D004.c
slapper	3A232.a.3
slurry deposition	2E003.f
slurry propellant control systems	9A106.d
small waterplane area vessels	8A001.i
smoke bombs	1A984
snubbers, nuclear plant	2A291.c
sodium bifluoride	1C350.a.43
sodium cyanide	1C350.a.44
sodium fluoride	1C350.a.45
sodium sulfide	1C350.a.46
software, development, production, or use of listed items	xDxxx
solenoidal electromagnets, superconducting	3A201.b
solenoids, superconductive	3A001.e.3
solenoids, superconductive	3A991.i
solid state imaging devices for cameras	6A203.b.3
solid state joining gas turbine components	9B004
solid state lasers	6A005.c
solid state storage equipment	4A994.d.2
sonar log, correlation velocity	6A001.b
space qualified batteries	3A001.e.1.c
space qualified batteries	3A992.g.3

Subject	Export Control Classification Number
space qualified cryocoolers	6A002.d.1
space qualified digital tape recorders	3A002.a.3.b
space qualified digital tape recorders	3A992.b.3
space qualified electronic vacuum tubes	3A001.b.1.a.4.c
space qualified focal plane arrays	6A002.e
space qualified multispectral imaging sensors	6A002.b.2.b.1
space qualified optical components	6A004.c
space qualified optical solid-state detectors	6A002.a.1
spacecraft	9A004.b
spark-gaps, triggered	3A228.b
specific modulus	1C010
specific modulus	1C210
specific modulus	1C990
specific modulus	9A110
specific tensile strength	1C010
specific tensile strength	1C210
specific tensile strength	1C990
specific tensile strength	9A110
spectrometers, mass	3A233
spin-forming machines	2B009
spin-forming machines	2B109
spin-forming machines	2B209
splat quenching	1C002.b.2.d, c
spread spectrtum	5A001.b.3
spread spectrum	5A002.a.5
spread spectrum radar techniques	6A008.h.1
sputter deposition	2E003.d
sputtering equipment	3B991.b.1.f
SRAMs	3A001.a.4
SRAMs	3A991.b
stainless steel	2A292
Staphylococcus aureus toxin	1C351.d.8
static random-access memories	3A001.a.4
storage tanks, chemical processing	2B350.a.1.c
straight jackets	0A982
streak cameras	6A003.a.3
streak cameras	6A203.a.2
stretch forming	2E003.c

Subject	Export Control Classification Number
strontium barium niobate focal plane array exception	6A002.a.3
sub-surface (water) communications technology	5E001.b.2
submarine diesel engines	8A018.b.1
submarine electric motors	8A018.b.2
submarine engines	8A992.g
submarine nets	8A018.b.5
submersible systems	8A992.e
submersible systems or equipment	8A002.a, b
submersible vehicles	8A001
sulfide, cerium crucibles	2A225.a.3
sulfur dichloride	1C350.a.48
sulfur monochloride	1C350.a.47
sulphides, polyarylene	1C008.e
sulphides, polyarylene	1C010.d.1.b
sulphides, polyarylene	1C010.d.2
sulphur detection	2B351.a
superalloys	2E003.f
superalloy gas turbine component joining	9B004
superconducting solenoidal electromagnets	3A201.b
superconductive circuits for energy storage	3A991.j
superconductive composite conductors	1C005
superconductive electromagnetic sensors	6A006.h
superconductive electromagnets or solenoids	3A001.e.3
superconductive electromagnets or solenoids	3A991.i
superconductive magnetometers	6A006.a
superconductive materials electronic devices	3A001.d
superplastic forming	1B003
superplastic forming	2E003.b.2.a
suppress compromising emanations	5A002.a.4
surface-effect vehicles	8A001.f, g
surface effect vehicle lift fans	8A002.l
surface effect vehicle skirts, seals, fingers	8A002.k
surreptitious intrusion, detect	5A002.a.7
sweetie barrels	1B018.a.2
switch fabric technology	5E001.b.5
switching devices	3A228
switching telecommunications equipment	5A991
Synchronous Digital Hierarchy (SDH)	5E001.b.4

Subject	Export Control Classification Number
Synchronous Optical Network (SONET)	5E001.b.4
syntactic foam for underwater use	8C001
synthetic crystalline laser host material	6C005
synthetic natural gas	1C984
systolic array computers	4A004.a
tactile measurement	2D992.a.2.d
tantalum	2E003.f
tantalum boride crucibles	2A225.c
tantalum carbide crucibles	2A225.c
tantalum chemical pumps	2B350.c.6
tantalum chemical processing equipment	2B350.a.2.f
tantalum crucibles	2A225.b
tantalum nitride crucibles	2A225.c
tape recorders, analog instrumentation	3A002.a.1
tape recorders, digital instrumentation	3A002.a.3
tape recorders, digital instrumentation	3A992.b
tape recorders, digital video	3A002.a.2
tape-laying machines	1B001.b
tape-laying machines	1B101.b
tapered roller bearings	2A991.b
tear gas	1A984
technology, development, production, or use of listed items	xExxx
telecommunications development equipment	5B001
telecommunications equipment	5A001
telecommunications production equipment	5B001
telecommunications source code recovery software	5D001.c.3
telecommunications test equipment	5B991
telecommunications use equipment	5B001
telecontrol equipment	5A101
telemetering equipment	5A101
telescopes for lasers	6A005.f.4
television systems, underwater	8A002.d.1.a
tellurium	6C002.a
temperature rated computers	4A001.a.1
temperature-rated computers	4A101.a
temperature rated computers	4A994.a
temperature-rated integrated circuits	3A001.a.2

Subject	Export Control Classification Number
temperature-rated telecommunications equipment	5A001.a.3
temperature-rated telecommunications equipment	5A990
terephthalic acid	1C008.b.2.a
terminal interface equipment, computers	4A994.i
Teschen disease virus	1C352.a.14
test equipment, electronic	3A992.a
Tetrodotoxin	1C351.d.9
thallium arsenic selenide	6C004.b.3
thermal evaporation	2E003.f
thermal ionization mass spectrometers	3A233.c
thermoplastic liquid crystal copolymers	1C008.b
thermoplastic liquid crystal copolymers	1C010.d.1.b
thermoplastic liquid crystal copolymers	1C010.d.2
thermoset resin impregnated materials	1C210.c
thio-ethers	1C006.b.1
thiodiglycol	1C350.a.49
thionyl chloride	1C350.a.50
Tick-borne encephalitis virus	1C351.a.15
tilt rotor power transfer technology	9E003.d
tilt wing aircraft power transfer technology	9E003.d
tilting spindles	2B991.d.1.a
tilting spindles	2B008.c
titanium alloys	1C002.a.2.c
titanium alloys	1C202.b
titanium alloys	2E003.f
titanium alloy powder	1C002.b.1.c
titanium alloys diffusion bonding	2E003.b
titanium alloys direct-acting hydraulic pressing	2E003.b
titanium alloys hot isostatic densification	2E003.b
titanium alloys superplastic forming	2E003.b
titanium aluminides	1C002.a.1.b
titanium borides	1C007.a, b
titanium chemical processing equipment	2B350.a.2.g
titanium chemical pumps	2B350.c.7
titanium diffusion bonding	1B003
titanium-doped sapphire	6C005.a
titanium gas turbine component joining	9B004
titanium superplastic forming	1B003
titanium-tungsten-niobium alloy, nitrided	2A225.a.7

Subject	Export Control Classification Number
titanium, in uranium alloys	1C004
toggle frequency	3A001.a.8.b
torpedo nets	8A018.b.5
torque measurement	2D992.a.2.g
torture implements	0A983
tow-placement machines	1B001.b
toxic gas detectors	2B351
toxic gas monitoring systems	2B351
toxins	1C351.d
tracking systems	6A108.b
tractors, off highway, wheel	9A990.b
tractors, on-highway	9A990.c
trainer aircraft, military	9A018.a
trainer aircraft, military	9A991.a.2
trainers, military instrument flight	9A018.f
transducers (hydrophones)	6A001.a.2.a
transducers, pressure	2B230
transducers, quartz pressure	6A226.b
transducers to measure wall skin friction	9B008
transient recorders	3A002.a.5
transient recorders	3A292
transistors, microwave	3A001.b.3
transmission equipment	5A001.b
transmission equipment	5A991
traveling wave tubes	3A001.b.1.a
traveling wave tubes	3A991.e
triethanolamine	1C350.a.51
triethanolamine hydrochloride	1C350.a.52
triethyl phosphite	1C350.a.53
triethylene glycol dinitrate (TEGDN)	1C111.c.2
triggered spark-gaps	3A228.b
triglycine sulphate focal plane array exception	6A002.a.3
trimethyl phosphite	1C350.a.54
trimethylolethane trinitrate (TMETN)	1C111.c.2.4
tritium-deuterim nuclear reaction	3A231
tritium facilities, plants and equipment	1B231
Trusted Computer System Evaluation Criteria	5A002.a.6
tunable band-pass or band-stop filters	3A001.b.5
tungsten	1C117

Subject	Export Control Classification Number
tungsten alloys	1C004
tungsten carbide	2E003.f
tungsten carbide parts	1C226
tungsten parts	1C226
turbine engine rotor component production	9B009
turboexpanders	1B232
turbofan engines	9A101
turbojet engines	9A101
TV cameras, radiation-hardened	6A203.c
ultrasonic test equipment	0B008.b
ultraviolet signatures	1C101
ultraviolet signatures	1D103
underwater breathing equipment	8A992.h
underwater cameras	8A992.a.2.b
underwater communication systems	5A001.b
underwater detection devices	6A018
underwater optical fiber coating technology	5E001.b.3
underwater rebreathing apparatus	8A018.a
underwater vision systems	8A002.d
underwater vision systems	8A992.a
unmanned air vehicle systems	9A120
unsymmetrical diphenylurea	1C018.b
uranium, depleted	1A290
uranium titanium alloys	1C004
uranium hexafluoride production	0B003
utility aircraft	9A991.a.3
vaccines	1C991
vacuum atomization	1C002.b.2.a
vacuum induction furnaces	2B226
vacuum pumps	2B231
vacuum tubes, electronic	3A001.b.1
valves	2A226
valves, chemical processing	2B350.a.1.f
valves, nickel or chromium	2A292
Variola virus	1C351.a.16
vehicles for military purposes	9A018.b
velocity interferometers	6A225
Venezuelan equine encephalitis virus	1C351.a.17
Verotoxin	1C351.d.10

Subject	Export Control Classification Number
Vesicular stomatitis virus	1C352.a.15
vibration test systems	2B116
vibration test equipment, acoustic	9B006
vibration test equipment	9B990
Vibrio cholerae	1C351.c.12
video cameras	6A003.b.1
vidicon tubes	6A203.b.3.b
vinylether monomer	1E002.b
vinylidene fluoride copolymers	1C009.a
viruses	1C351.a
viruses	1C352.a
voice print identification	3A980
wafer error detection	3B991.b.3
wafer finishing	3B991.b.1.k
wafer handling	3B001.e
wafer probing	3B991.b.6
wall skin friction measurement	9B008
water cannon	0A989
water-hydrogen sulfide exchange tray columns	1B229
water jet gas turbine engine technology	9E003.c
water-screw propeller or power transmission	8A002.o
water tunnels	8B001
waterplane area, vessels with small	8A001.i
waveform digitizers	3A002.a.5
wavefront measuring equipment	6A005.f.1
waveguides, flexible	3A992.e
weaving machines	1B001.c
Western equine encephalitis virus	1C351.a.18
Western red cedar	1C988
wet-spinning of refractory materials	1B001.d.3
wet-spinning of refractory materials	1B101.c.3
White pox	1C351.a.19
wind tunnels	9B105
wind tunnel aero model technology	9E003.b.1
wind tunnel control systems	9B005
wind tunnel software	9D004.a
Xanthonomas albilineas	1C354.a.1
Xanthonomas campestris pv. citri	1C354.a.2
Yellow fever virus	1C351.a.20

Subject	Export Control Classification Number
Yersinia pestis	1C351.c.13
yttria crucibles	2A225.a.8
yttrium oxide crucibles	2A225.a.8
zinc selenide optical components	6A004.b
zinc selenide substrate blanks	6C004.a
zinc sulphide	6A004.b
zinc sulphide substrate blanks	6C004.a
zirconate, calcium crucibles	2A225.a.2
zirconia crucibles	2A225.a.9
zirconia, modified	2E003.f
zirconium	1C234
zirconium carbides or nitrides	1C007.d
zirconium chemical processing equipment	2B350.a.2.h
zirconium chemical pumps	2B350.c.8
zirconium fluoride	6C004.e
zirconium metal fuels	1C011.a
zirconium oxides	1E002.c.1.a.1
zirconium oxide crucibles	2A225.a.9
zirconium titanate focal plane array exception	6A002.a.3
zoonoses	1C351

APPENDIX 4-2 CCL Revisions to Conform with WDUL and WML

This Appendix consists of informal suggestions, in line-in ~~line-out~~ form, to indicate how items on the Commerce Control List (CCL) might be revised to conform with multilaterally-agreed Wassenaar Dual-Use List (WDUL) and Wassenaar Munitions List (WML) texts or to remove internal inconsistencies.

These revisions are not in effect and may never be.

Explanatory material appears in parentheses. It appears the first time the issue is raised and is generally not repeated for subsequent instances of the same issue.

This Appendix is based on CCL texts in effect June 15, 2000, and WDUL texts as revised by Wassenaar in December 1998 (a few later WDUL revisions are not yet publicly available).

0A018

a. ~~Power controlled search lights . . .~~
(There is no such item on the WML)

b. Construction equipment ~~built to military specifications,~~ specially designed for ~~airborne transport~~ military use, and specially designed ~~parts and accessories~~ components therefor
(For consistency with WML 17.b)

d. ~~Bayonets~~
(There is no such item on the WML)

e. ~~Muzzle loading (black powder) firearms~~
(There is no such item on the WML)

0D018

"Software" specially designed or modified for the "development", "production" or "use" of equipment controlled by 0A018.b, c, or f
(For consistency with WML 21.a)

0E018

"Technology" according to the General Technology Note for the "development", "production" or "use" of items controlled by ~~0A018.e through 0A018.e~~ 0A018.b, c, or f or for 0D018
(For consistency with WML 22)

1A002

NS applies to entire entry ~~except finished or semifinished items specially designed for purely civilian applications as follows: sporting goods, automotive industry, machine tool industry, and medical applications~~

Related Controls: . . . (2) . . . controlled by ~~9A1102~~ 9A110. (3) This entry does not control (a) . . . (b) finished or semifinished items specially designed for purely civilian applications as follows: sporting goods, automotive industry, machine tool industry, and medical applications. (3) The MT portion of 1A002 is subject to the export licensing authority of the U.S. Department of State, Office of Defense Trade Controls (see 22 CFR Part 121).

(moving the exception from "NS applies" to "Related Controls" is to conform with Wassenaar and EU; the numbering of 1A102 indicates that 1A002 and 1A102 overlap; it would therefore be reasonable to provide in 1A002 that the portion thereof also described in 1A102 is MT and is subject to the export licensing authority of the U.S. Department of State, Office of Defense Trade Controls)

1A005

Related Controls: . . . (4) See 746.8(b)(1) and 746.9 for additional licensing requirements concerning this entry.

~~1B018~~

(Revise and transfer to 9B018 for consistency with WML 18)

1C010

Related Controls: . . . material not controlled by 1C010.e ~~, as defined by technical notes 1 or 2. Note that some items in 1C010.e are also controlled under 9A110~~.

(Notes describing what 1C010.e does not control are not "technical notes." There are other materials not described in the two decontrol notes which are not controlled by 1C010.e because below the e.1 or e.2 thresholds which might be covered by 9A110. But no material should be controlled by both items. This should be avoided by adding to 9A110 "not controlled by 1C010," as is customary for other MT items which would otherwise overlap Wassenaar items.)

1C018

Note: 1C018 does not control perforators specially designed for oil well logging.

(For consistency with WML 8 Note 4).

1D001

TSR: Yes, except N/A for MT or NP; No assurance required
(Exception for NP is for consistency with 740.6(a) provision that TSR is limited to items controlled for national security reasons only. No assurance required is for consistency with eligibility for CIV, which permits direct export to TSR assurance prohibited destinations)

1D002

TSR: . . . No assurance required
(CIV permits direct export to TSR assurance prohibited destinations)

1D018

"Software" specially designed or modified for the "development", "production" or "use" of items controlled by ~~1B018~~ 1C018.
(For consistency with WML 21.a and transfer of 1B018 to 9B018)

1E001

"Technology" . . . 1C (except 1C018, . . . 1C996.
NS applies to "technology" for items controlled by . . . 1C001 to ~~1C010~~ 1C011, ~~or 1C018,~~ TSR: Yes, except for the following:
(1) Items controlled for MT, NP or CB reasons; or
(2) . . .
~~(a) Items controlled by 1C001; or~~
Related Controls: (1) See also 1E101 and ~~1E210~~ 1E201. (2) "Technology" for items controlled by the NRC portion of 1C235 . . .
(There should be a separate item for 1E018. xx2xx items are not controlled for national security reasons; since 1C001 is an MT item, it is not eligible for TSR;

NRC does not control the products or devices portion of 1C235.)

1E018

"Technology" according to the General Technology Note for the "development", "production" or "use" of items controlled by 1C018 or 1D018.

(For consistency with WML 22)

2.A. Systems, Equipment, ~~Assemblies~~ and Components

2B001

Unit: Equipment in number; ~~parts and accessories~~ components in $ value.

a.1 Positioning accuracy with "all compensations available" ~~of less~~ equal to or less (better) than ~~6 micrometer~~ 4.5 micrometer according to ISO 230/2 (1997) or national equivalents along any linear axis;

b.1.a Positioning accuracy with "all compensations available" ~~of less~~ equal to or less (better) than ~~6 micrometer~~ 4.5 micrometer according to ISO 230/2 (1997) or national equivalents along any linear axis;

b.3 A positioning accuracy for jig boring machines, with "all compensations available" ~~of less~~ equal to or less (better) than 4 ~~micrometer~~ 3.0 micrometer according to ISO 230/2 (1997) or national equivalents along any linear axis;

c.1.a Positioning accuracy with "all compensations available" ~~of less~~ equal to or less (better) than ~~4 micrometer~~ 3.0 micrometer according to ISO 230/2 (1997) or national equivalents along any linear axis. ~~(overall positioning)~~

2B003

"Numerically controlled" or manual machine tools, and specially designed components, ~~controllers~~ controls, and accessories therefor specially designed for . . . gears.

Unit: Equipment in number; ~~parts~~ components, controls, and accessories in $ value.

2B004

Unit: Equipment in number; ~~parts~~ components and accessories in $ value.

2B009

. . . and having all ~~the characteristics~~ of the following:

~~2B018~~

Revise and transfer to 9B018 for consistency with WML 18)

2D001

TSR: Yes, except N/A for MT or NP
Related Controls: This entry controls software~~, not covered by 2D010,~~ that are specially designed or modified for the ~~controllers~~ control of flow forming machines specified by ~~2B109~~ 2B009.

2D002

TSR: Yes, except N/A for NP
Related Controls . . . (2) . . . machine tools not controlled by ~~Category 2~~ 2B001 to 2B009.

(EU "Category 2" does not include U.S. unilaterally controlled items)

~~2D018~~

(Revise and transfer to 9D018 for consistency with suggested transfer of 2B018)

2E001

"Technology" . . . for . . . 2B (except 2B991, 2B992, . . .) . . .
MT applies . . . ~~2B018~~ . . .
TSR: Yes, except N/A for MT, NP, or CB

2E002

"Technology" . . . for . . . 2B (except 2B991, 2B992, . . .)
MT applies . . . ~~2B018~~ . . .
TSR: Yes, except N/A for MT, NP, or CB

2E003

Related Controls: See 2E001, ~~2E002,~~ and 2E101 for "development" or "use" technology for equipment that are designed or modified for densification of ~~carbon-carbon composites,~~ structural composite rocket nozzles and reentry nose tips.

Table - Deposition Techniques

D (carbides should be in column 3, instead of in column 2; corrosion resistant steel should not be merged with refractory metals and alloys; abradable, nickel graphite should be in column 3 without a comma instead of in column 2 with a comma)

Notes:

17. . . . ~~disposals~~ disposables . . .

~~2E018~~ 22

~~"technology" for the "use" of equipment controlled by 2B018~~

Revise and transfer to 9E018 for consistency with WML 18 and 22

3A001

CIV: Yes, except 3A001 . . . a.5.a. . . .

(for consistency with previous CIV eligibility)

a.2 ~~Integrated circuits described in 3A001.a.3 to 3A001.a.10 or 3A001.a.12~~ "Microprocessor microcircuits", "microcomputer microcircuits", microcontroller microcircuits, storage integrated circuits manufactured from a compound semiconductor, analog-to-digital converters, digital-to-analog converters, electro-optical or "optical integrated circuits" designed for "signal processing", field programmable gate arrays, field programmable logic arrays, neural network integrated circuits, custom integrated circuits for which either the function is unknown or the control status of the equipment in which the integrated circuit will be used is unknown, Fast Fourier Transform (FFT) processors, electrical erasable programmable read-only memories (EEPROMs), flash memories ~~and~~ or static random access memories (SRAMs), having any of the following: . . .

3A002

c.2 ~~Technical Note: Constant percentage bandwidth filters are also known as octave or fractional octave filters.~~

(substance of Technical Note is in the revised Note)

3B002

b. Note: 3B002.b does not control test equipment specially designed for testing:
1."Electronic ~~A~~assemblies" or a class of "electronic assemblies"
. . .
2.~~Uncontrolled e~~ Electronic components, "electronic assemblies" or integrated circuits not contolled by an ECCN with a third digit 0 or by the U.S. Munitions List.

3C002

Resist materials, as follows, and substrates coated ~~with controlled resists~~ therewith
(to clarify that controlled substrates are not listed under "Items" and that the "controlled" resists are those which are listed in 3C002)

3C004

Related Controls: This entry does not control hydrides containing ~~less than~~ 20% molar or more . . .

3D001

NS applies to . . . ~~and 3B~~ 3B001 and 3B002 . . .

3E001

"Technology" . . . for . . . 3C (except 3C992) . . .
NS applies to . . . 3B001 ~~and~~ , 3B002 . . .
TSR: Yes, except N/A for MT or NP

Category 4 Computers

748 Supplement 2 (c)

~~If your license application involves items controlled by both Category 4 and Category 5, your license application must be submitted according to the principle function of the equipment. License applications involving computers controlled by Category 4 must identify a Composite Theoretical Performance (CTP) . . . If the principal function is telecommunications, a CTP is not required.~~

(For consistency with Category 4 Note 1, which provides that computers performing telecommunications functions must "also" be evaluated against Category 5. The guidance in Category 5 Note 2 that computers essential for telecommunications are regarded as specially designed components does not remove the applicability of Category 4 CTP limits.)

4A001

~~XP applies~~

(CTP is not relevant to 4A001)

Unit: Equipment in number; ~~parts and accessories~~ "electronic assemblies"and components in $ value.

Related Definitions: . . . ~~103~~ 10^3 . . . ~~105~~ 10^5 . . . ~~106~~ 10^6 . . . ~~108~~ 10^8 . . .

a.1 Note: ~~The temperature limits in~~ 4A001.a.1 ~~do not apply to~~ does not control computers specially designed for civil automobile ~~and~~ or railway train applications.

4A002

"Hybrid computers", having (all) (any of) the following characteristics, and "electronic assemblies" and specially designed components therefor:

(the lack of either "and" or "or" connecting the two sub-items 4A002.a and 4A002.b leads to ambiguity)

. . . ~~NS Column 2~~ NS Column 1

(to avoid NLR over 33,000 MTOPS to CT 2 countries Hong Kong and Korea)

Unit: Equipment in number; ~~parts and accessories~~ "electronic assemblies" and components in $ value.

Related Controls: See also 4A102 and 4A994. The portion of 4A002 also described in 4A102 is subject to the export licensing authority of the U.S. Department of State, Office of Defense Trade Controls. (See 22 CFR part 121.)

a. . . . ; (and) or (or)

4A003

"Digital computers", "electronic assemblies", and related equipment therefor., as follows, and specially designed components therefor.

Note: For all destinations except Cuba, . . . Sudan, ~~and~~ Syria, Serbia excluding Kosovo, and Taliban-controlled areas of Afghanistan . . .. CTP . . . ~~digital to analog~~ . . .

(3A001.a.5.a does not control digital-to-analog; exclusion of .e from CTP eligibility is an empty box, since .e is eligible for GBS)

Unit: Equipment in number; ~~parts and accessories~~ "electronic assemblies" and components in $ value.

(accessories were expressly removed from coverage of 4A003 a few years ago)

D. Software

Note: The control status of "software" ~~for the "development", "production", or "use" of equipment~~ related to items described in other Categories is dealt with in ~~the appropriate Category~~ the Categories for those items. The control status of other "software" ~~for equipment described in this Category~~ is dealt with ~~herein~~ in Category 4.

(Although the unrevised CCL Note is identical to the corresponding Wassenaar Note, neither one makes sense, in that all software is for computers described in Category 4.)

4D002

. . . controlled by 4E (except 4E980, . . .)
NS applies to ~~entire entry~~ "software" to support NS portion of 4E001.
XP . . . ~~742.3(b)~~ 742.12 . . .

4D003

c. "Software" having characteristics or performing functions exceeding the limits in Category 5, Part 2 ("Information Security").
Note: 4D003.c does not control "software" when accompanying its user for the user's personal use.

5A001

. . . and components , as follows
~~LVS . . .~~

(LVS is an empty box because of GBS eligibility)
Unit: Equipment in number; ~~parts~~ components ~~and accessories~~ in $ value.

5B001

~~LVS . . .~~

(LVS is an empty box because of GBS eligibility)
Unit: Equipment in number; ~~parts~~ components and accessories in $ value.

5D001

TSR . . . No assurance required except for 5D001.a for 5A001.b.4
(CIV permits direct export to TSR assurance prohibited destinations)

5E001

a. . . . equipment, functions or features, materials or "software" controlled by 5A001, 5B001, ~~or~~ 5D001, or 5E001.

5A002

Systems, equipment application specific "electronic assemblies", modules and integrated circuits for "information security", as follows, and other specially designed components therefor.
Related Controls . . . ~~This entry does not control . . .~~
~~License Requirement Notes: See 743.1 . . .~~
Note: This entry does not control . . .
(A list of items not controlled is not a related control)

5B002

~~License Requirement Notes: See 743.1 . . .~~

5D002

~~License Requirement Notes: See 743.1 . . .~~
Related Controls . . . ~~This entry does not control . . .~~
Note: This entry does not control . . .

5E002

~~License Requirement Notes: See 743.1 . . .~~

6A001

LVS . . . ~~6A002.a.2.c~~ . . . 6A001.a.2.c . . . ~~6A002.a.2.e.3~~ 6A001.a.2.f

6A002

Unit: Equipment in number~~; parts and accessories in $ value~~

6A003

GBS: Yes for 6A003.a.1 and the non-NP portion of 6A003.a.2 with framing speed of not more than 2 million frames per second.
CIV: Yes for 6A003.a.1 and the non-NP portion of 6A003.a.2 with framing speed of not more than 2 million frames per second.

(For consistency with Advisory Note 3 in pre-1996 CCL)

6A005

GBS: Yes, for:

6A005.d (except the NP portion of d.2.c.);

6A005.a.4.a, a.4.b, and the non-NP portion of a.4.c (including the CO/CO_2 portion of a.3) CO_2 or CO/CO_2 "lasers" having an output wavelength in the range from 9,000 to 11,000 nm and having a pulsed output not exceeding 2 J per pulse and a maximum rated average single or multimode output power not exceeding 5 kW;

6A005.a.3 CO "lasers" having a CW maximum rated single or multimode output power not exceeding 10 kW;

6A005.a.4.a, a.4.b, and the non-NP portion of a.4.c "lasers" that operate in CW multiple transverse mode~~;~~ and have a CW output power not exceeding 15 kW;

6A005.b "lasers" designed for use with a civil fiber optic communication system that have an output wavelength not exceeding 1,370 nm and a CW power output not exceeding 100 mW;

non-NP portion of 6A005.c.2.b.2.b Neodymium-doped (other than glass, pulse-excited), "Q-switched lasers" ~~controlled by~~ ~~6A005.c.2.b.2.b~~ having a pulse duration

equal to or more than 1 ns~~;~~ and a multiple transverse mode output with a "peak power" not exceeding 400 MW;

6A005.c.2.b.3.b. or c.2.b.4.b Neodymium-doped (other than glass) "lasers" ~~controlled by 6A005.c.2.b.3.b or 6A005.c.2.b.4.b~~ that have an output wavelength exceeding 1,000 nm~~,~~ but not exceeding 1,100 nm~~;~~, ~~and~~ that have an average or CW output power not exceeding 2 kW~~;~~, and that operate in a pulse-excited, non-"Q-switched" multiple-transverse mode~~;~~ or in a continously excited, multiple-transverse mode; and

6A005.~~g.1.~~f.

(eligibility for 6A005.b is based on Advisory Note 9 in Category 5 Part 1 Telecommunications)

CIV: Yes, for:

6A005.d (except the NP portion of d.2.c.);

6A005.a.4.a, a.4.b, and the non-NP portion of a.4.c (including the CO/CO_2 portion of a.3) CO_2 or CO/CO_2 "lasers" having an output wavelength in the range from 9,000 to 11,000 nm and having a pulsed output not exceeding 2 J per pulse and a maximum rated average single or multimode output power not exceeding 5 kW;

6A005.a.3 CO "lasers" having a CW maximum rated single or multimode output power not exceeding 10 kW;

6A005.a.4.a, a.4.b, and the non-NP portion of a.4.c "lasers" that operate in CW multiple transverse mode~~;~~ and have a CW output power not exceeding 15 kW;

6A005.b "lasers" designed for use with a civil fiber optic communication system that have an output wavelength not exceeding 1,370 nm and a CW power output not exceeding 100 mW;

non-NP portion of 6A005.c.2.b.2.b Neodymium-doped (other than glass), pulse-excited, "Q-switched lasers" ~~controlled by 6A005.c.2.b.2.b~~ having a pulse duration equal to or more than 1 ns~~;~~ and a multiple transverse

mode output with a "peak power" not exceeding 400 MW;

6A005.c.2.b.3.b. or c.2.b.4.b Neodymium-doped (other than glass) "lasers" ~~controlled by 6A005.c.2.b.3.b or 6A005.c.2.b.4.b~~ that have an output wavelength exceeding 1,000 nm~~;~~ but not exceeding 1,100 nm~~;~~, ~~and~~ that have an average or CW output power not exceeding 2 kW~~;~~, and that operate in a pulse-excited, non-"Q-switched" multiple-transverse mode~~;~~ or in a continously excited, multiple-transverse mode; and

6A005.~~g.1.~~f.

(Eligibility for 6A005.b is based on pre-1998 Advisory Note 9 in Category 5 Part 1 Telecommunications.)

Unit: Equipment in number; ~~parts and accessories~~ "lasers", assemblies and components in $ value.
Related Controls: . . . ~~0B001.b.6~~ 0B001.h.6

6A008

. . . having any of the following characteristics . . .

6A018

~~Magnetic, pressure, and acoustic u~~ Underwater detection devices specially designed for military ~~purposes~~ use and controls thereof and components therefor.

(For consistency with WML 9.c)

6C004

e.1 A ~~hydroxil~~ hydroxyl ion . . .

6D001

TSR: Yes, except for the following:
(1) Items controlled for MT or NP reasons; or . . .

6D003

CIV: Yes for ~~6D003.h.1~~ 6D003.h
(all of 6D003.h was eligible for GLX per 771A Supplement 1, when it was 6D03A.d)

TSR: Yes, ~~except~~ for the following

(1) ~~Items controlled for MT reasons; or (2) exports or reexports to destinations outside of~~ 6D003.a only to Austria . . . United Kingdom ~~of "software" for items controlled by 6D003.a~~;
(2) 6D003.h, no assurance required;
(3) 6D003.f and .g
(for internal consistency, including consistency with CIV)

a.3 "Software" specially designed for ~~bottom or bay cable systems and having~~ acoustic beam forming ~~or "source code"~~ for the "real time processing" of acoustic data for passive reception using bottom or bay cable systems;

a.4 "Source code" for the "real time processing" of acoustic data for passive reception using bottom or bay cable systems;

6D018

"Software"specially designed or modified for the "development, "production" or "use" of equipment controlled by 6A018.
(For consistency with WML 21.a)

6E001

TSR: Yes, except for the following:
(1) Items controlled for MT or NP reasons; or . . .

6E002

TSR: Yes, except for the following:
(1) Items controlled for MT or NP reasons; or . . .

6E018

"Technology" according to the General Technology Note for the "development", "production" or "use" of items controlled by 6A018 or 6D018.
(For consistency with WML 22)

7A005

Global navigation satellite systems (i.e., GPS or GLONASS) receiving equipment having any of the following characteristics, and specially designed components therefor:

b. Employing decryption; or
c. A null-steerablel antenna
(Item detail is needed to limit DOS jurisdiction and to conform with Wassenaar and EU)
MT applies to portion of 7A005 also described in 7A105.

7A007

Direction finding equipment operating at frequencies above 30 MHz and having all of the following characteristics and specially designed components therefor.
Items:
a. "Instantaneous bandwidth" of 1 MHz or more;
b. Parallel processing of more than 100 frequency channels; and
d. Processing rate of more than 1,000 direction finding results per second and per frequency channel.
(Item detail is needed to limit DOS jurisdiction and to conform with Wassenaar and EU)

7B001

Test, calibration or alignment equipment specially designed for equipment controlled by ~~7A (except 7A994)~~ 7A001 to 7A007, 7A101 to 7A106, 7A115 to 7A117, including items, or portions thereof, subject to the export licensing authority of the U.S. Department of State, Office of Defense Trade Controls.
NS applies to ~~entire entry~~ equipment specially designed for 7A001 to 7A007.

7B003

Equipment specially designed for the "production" of equipment controlled by ~~7A (except 7A994)~~ 7A001 to 7A007, 7A101 to 7A106, 7A115 to 7A117, including items, or portions thereof, subject to the export licensing authority of the U.S. Department of State, Office of Defense Trade Controls.
NS applies to ~~entire entry~~ equipment specially designed for 7A001 to 7A007.

7D001

NS applies to "software" for equipment controlled by 7A001 to 7A004, 7A006, the NS portion of 7B001, 7B002, or the NS portion of 7B003.

7D002

"Source code" for the "use" of any inertial navigation equipment ~~or Attitude Heading Reference Systems (AHRS) (except gimballed AHRS)~~ including inertial equipment not controlled by 7A003 or 7A004, or Attitude Heading Reference Systems (AHRS) (except gimballed AHRS).

7E001

NS applies to "technology" for items controlled by 7A001 to 7A004, 7A006, ~~7B001 to 7B003,~~ the NS portion of 7B001, 7B002, the NS portion of 7B003, ~~7D001 to 7D003,~~ the NS portion of 7D001, 7D002, or 7D003.

7E002

NS applies to "technology" for items controlled by 7A001 to 7A004, 7A006, ~~7B001 to 7B003,~~ the NS portion of 7B001, 7B002, the NS portion of 7B003, ...

8A001

Unit: ~~Equipment in~~ number~~; parts and accessories in $ value~~

8A002

Related Controls: (1) See also ... (2) 8A002.q is subject to the export licensing authority of the U.S. Department of State, Office of Defense Trade Controls (see 22 CFR part 121 Category XIII(c)(1))

q. Self-contained, closed or semi-closed circuit (rebreathing) diving and underwater swimming apparatus.

8A018

.a. ~~Closed and semi-closed circuit (rebreathing) apparatus for diving and underwater swimming, and specially designed components for use in the conversion of open-circuit apparatus to military use~~

(covered by USML Category XIII(c))

b.1 Diesel engines of 1,500 hp and over with rotary speed of 700 rpm or over specially designed for submarines, and specially designed components therefor.

(For consistency with WML 9.b.1)

b.2 Electric motors specially designed for submarines, i.e., over 1,000 hp. quick reversing type, liquid cooled, and totally enclosed, and specially designed components therefor.

(For consistency with WML 9.b.2)

b.3 Nonmagnetic diesel engines, 50 hp and over, specially designed for military purposes. ~~(An engine shall be presumed to be specially designed for military purposes if it has nonmagnetic parts other than crankcase, block, head, pistons, covers, end plates, valve facings, gaskets, and fuel, lubrication and other supply lines, or its~~ with nonmagnetic content ~~exceeds~~ in excess of 75 percent of total ~~weight.)~~ mass and specially designed components therefor.

(For consistency with WML 9.b.3)

~~b.4 Marine boilers . . .~~

(There is no equivalent WML item)

b.5 Submarine and torpedo nets and specially designed components therefor.

(For consistency with WML 9.d)

~~b.6 Components, parts, accessories, and attachments for the above~~

(WML 9 portion moved to b.1-3,5)

8D018

"Software" specially designed or modified for the "development," "production" or "use" of equipment controlled by 8A018.

(For consistency with WML 21.a)

8E018

"Technology" according to the General Technology Note for the "development", "production" or "use" of items controlled by 8A018 or 8D018.

(For consistency with WML 22)

9A001

Unit: ~~Equipment in~~ number~~; parts and accessories in $ value~~

b. Not certified for civil use by the aviation authorities in ~~Country Group A:1~~ a country listed in 743 Supplement 1.

9A003

b. Whose design or production origins are either countries ~~in Country Group D:1~~ other than those listed in 743 Supplement 1 or unknown to the manufacturer.

9A006

Systems and components specially designed for liquid rocket propulsion systems, as follows: N.B. See also 9A106 and 9A108. . . .
Items:

a. Cryogenic refrigerators, flightweight dewars, cryogenic heat pipes or cryogenic systems specially designed for use in space vehicles and capable of restricting cryogenic fluid losses to less than 30% per year;
b. Cryogenic containers or closed-cycle refrigeration systems capable of providing temperatures of 100 K (−173°C) or less for "aircraft" capable of sustained flight at speeds exceeding Mach 3, launch vehicles or "spacecraft";
c. Slush hydrogen storage or transfer systems;
d. High pressure (exceeding 17.5 Mpa) turbo pumps, pump components or their associated gas generator or expander cycle turbine drive systems;
e. High-pressure (exceeding 10.6 Mpa) thrust chambers and nozzles therefor;
f. Propellant storage systems using the principle of capillary containment or positive expulsion (i.e., with flexible bladders);
g. Liquid propellant injectors, with individual orifices of 0.381 mm or smaller in diameter (an area of 1.14×10^{-3} cm^2 or smaller for non-circular orifices) specially designed for liquid rocket engines;
h. One-piece carbon-carbon thrust chambers or one-piece carbon-carbon exit cones with densities exceeding 1.4 g/cm^3 and tensile strengths exceeding 48 MPa.

(item detail needed to definet DOS jurisdiction and conform with Wassenaar and EU)

9A007

Solid rocket propulsion systems with any of the following:

a. Total impulse capacity exceeding 1.1 Mns;
b. Specific impulse of 2.4 kNs/kg or more when the nozzle flow is expanded to ambient sea level conditions for an adjusted chamber pressure of 7 Mpa;
c. Stage mass fractions exceeding 88% and propellant solid loadings exceeding 86%;
d. Any of the components controlled by 9A008; or
e. Insulation and propellant bonding systems using direct-bonded motor designs to provide a strong mechanical bond or a barrier to chemical migration between the solid propellant and case insulation material.
Technical Note:
For the purposes of 9A007.e, a strong mechanical bond means bond strength equal to or more than propellant strength.
(Item detail needed to define DOS jurisdiction and to conform with Wassenaar and EU)

9A008

Components, as follows, specially designed for solid rocket propulsion systems: . . .
Items:

a. Insulation and propellant bonding systems using liners to provide a strong mechanical bond or a barrier to chemical migration between the solid propellant and case insulation material;
Technical Note:
For the purposes of 9A008.a., a strong mechanical bond means bond strength equal to or more than propellant strength.
b. Filament-wound "composite" motor cases exceeding 0.61 m in diameter or having structural efficiency ratios (PV/W) exceeding 25 km.
Technical Note:

The structural efficiency ratio (PV/W) is the burst pressure (P) multiplied by the vessel volume (V) divided by the total pressure vessel weight (W).

c. Nozzles with thrust levels exceeding 45 kN or nozzle throat erosion rates of less than 0.075 mm/s;

d. Movable nozzle or secondary fluid injection thrust vector control systems capable of any of the following:

d.1. Omni-axial movement exceeding + 5°;

d.2. Angular vector rotations of 20°/s or more; or

d.3. Angular vector accelerations of $40°s^2$ or more.

(Item detail needed to define DOS jurisdiction and to conform with Wassenaar and EU)

9A009

Hybrid rocket propulsion systems with
Items:

a. Total impulse capacity exceeding 1.1 Mns; or

b. Thrust levels exceeding 220 kN in vacuum exit conditions.

(Item detail needed to define DOS jurisdiction and to conform with Wassenaar and EU)

9A010

. . . or "spacecraft", as follows: . . .
Items:

a. Components and structures each exceeding 10 kg. specially designed for launch vehicles manufactured using metal "matrix", "composite", organic "composite", ceramic "matrix" or intermetallic reinforced materials controlled by 1C007 or 1C010;

Note: The weight cut-off is not relevant for nose cones.

b. Components and structures specially designed for launch vehicle propulsion systems controlled by 9A005 to 9A009 manufactured using metal matrix, composite, organic composite, ceramic matrix or intermetallic reinforced materials controlled by 1C007 or 1C010;

c. Structural components and isolation systems specially designed to control actively the dynamic response or distortion of "spacecraft" structures;

d. Pulsed liquid rocket engines with thrust-to-weight ratios equal to or more than 1 kN/kg and a response time (the time required to achieve 90% of total rated thrust from start-up) of less than 30 ms.

(Item detail needed to define DOS jurisdiction and to conform with Wassenaar and EU)

9A018

b. Vehicles specially designed or modified for military ~~purposes~~ use . . .

(For consistency with WML 6)

c. Pressure refuelers, pressure refueling equipment, ~~and~~ equipment specially designed to facilitate operations in confined areas~~;~~, and ground equipment~~, n.e.s.,~~ developed specially for military "aircraft" ~~and helicopters, and specially designed parts and accessories, n.e.s.~~

(For consistency with WML 10.f; the definition of "aircraft" includes helicopters)

d. Pressurized breathing equipment specially designed for use in military "aircraft" ~~and helicopters~~

e. Military parachutes ~~and complete canopies, harnesses, and platforms and electronic release mechanisms therefor, except such types as are in normal sporting use~~ except parachutes for pin point dropping of rangers or dropping of paratroopers, cargo parachutes, paragliders (drag parachutes, drogue parachutes for stabilization and attitude control of dropping bodies, e.g., recovery capsules, ejection seats, bombs), drogue parachutes for use with ejection seat systems for deployment and inflation sequence regulation of emergency parachutes, recovery parachutes for guided missiles, drones or space vehicles, or approach parachutes and landing deceleration parachutes, all of which are subject to the export licensing authority of the U.S. Department of State, Office of Defense Trade Controls. (See 22 CFR parts 120 through 130)

(For consistency with WML 10.h.7; assumes WML 10.h.1-6 are on the USML)

f. Military instrument flight trainers, except for combat simulation; and components~~, parts, attachments~~ and accessories specially designed for such equipment

(For consistency with WML 14)

9B001

LVS: ~~$5,000 except~~ N/A ~~for MT~~

(LVS is an empty box because of GBS eligibility)

9B002

LVS: ~~$5,000 except~~ N/A ~~for MT~~

(LVS is an empty box because of GBS eligibility)

9B003

LVS: ~~$5,000 except~~ N/A ~~for MT~~

(LVS is an empty box because of GBS eligibility)

9B004

LVS: ~~$5,000 except~~ N/A ~~for MT~~

(LVS is an empty box because of GBS eligibility)

9B006

LVS: ~~$5,000 except~~ N/A ~~for MT~~

(LVS is an empty box because of GBS eligibility)

9B009

Unit: ~~Equipment in~~ number~~; parts and accessories in $ value~~

9B018

(Replacement for 1B018 and 2B018; unrevised text from 2B018)
~~Equipment on the International Munitions List~~ Munitions production

Reason for Control: NS, MT, RS, AT
NS applies to entire entry NS Column 1

MT applies to ~~specialized machinery, equipment, and gear for producing rocket systems (including ballistic missile systems, space launch vehicles, and sounding rockets) and unmanned air vehicle systems (including cruise missile systems, target drones, and reconnaissance drones) usable in systems that are controlled for MT reasons "missiles" including their propulsion systems and components and pyrolytic deposition and densification equipment~~ portions of 9B018 also described in 1B101, 1B115, 1B116, 1B117, 2B104, 2B115, 2B116, 6B108, 7B102, 7B103, 9B105, 9B106, 9B115, 9B116, and 9B117.

MT Column 1
RS applies to entire entry RS Column 1
AT applies to entire entry AT Column 1
LVS: $3,000 except N/A for Rwanda and Serbia & Montenegro.

GBS: Yes for ~~Advisory Note in this entry~~ equipment used to determine the safety data of explosives, as required by the International Convention on the Transport of Dangerous Goods (C.I.M.) articles 3 and 4 in Annex 1 RID for the testing of explosives to transport safety standards, of the following description:

a. Equipment for determining the ignition and deflagration temperatures;
b. Equipment for steel-shell tests;
c. Drophammers not exceeding 20 kg in weight for determining the sensitivity of explosives to shock;
d. Equipment for determining the friction sensitivity of explosives when exposed to charges not exceeding 36 kg in weight.

CIV: N/A
Unit: Equipment in number; ~~parts and accessories~~ components in $ value.
Related Controls: N/A
Related Definition: N/A
Items: delete and substitute:

a. Specially designed or modified "production" equipment for the "production" of products controlled by the U.S. Munitions List (22 CFR 121) or by ECCNs on the CCL with

last two digits "18" and specially designed components therefor;

b. Specially designed environmental test facilities and specially designed equipment therefor, for the certification, qualification, or testing of products controlled by the U.S. Munitions List (22 CFR 121) or by ECCNs on the CCL with last two digits "18".

Note: 9B018 includes the following equipment:

a. Continuous nitrators;
b. Centrifugal testing apparatus or equipment having any of the following characteristics:
   1. Driven by a motor or motors having a total rated horse power of more than 298 kW (400 hp);
   2. Capable of carrying a payload of 113 kg or more; or
   3. Capable of exerting a centrifugal acceleration of 8 g or more on a payload of 91 kg or more;
c. Dehydration presses;
d. Screw extruders specially designed or modified for military explosive extrusion;
e. Cutting machines for the sizing of extruded propellants;
f. Sweetie barrels (tumblers) 1.85 m and over in diameter and having over 227 kg product capacity;
g. Continuous mixers for solid propellants;
h. Fluid energy mills for grinding or milling the ingredients of military explosives;
i. Equipment to achieve both sphericity and uniform particle size in metal powder listed in 22 CFR 121.12 (a)(1);
j. Convection current converters for the conversion of materials listed in 22 CFR 121.12(a)(10).

9D001

"Software" ~~required~~ specially designed or modified for the "development" or equipment or "technology" controlled by 9A (except 9A018, 9A104, 9A110, 9A115, 9A120, 9A980, 9A990 ~~or 9A991~~ to 9A992), 9B (except 9B018, 9B115, 9B990 or 9B991) or 9E002.

Related Controls: . . . (2) "Software" ~~"required"~~ specially designed or modified . . . (3) "Software" ~~"required"~~ specially designed or modified . . .

(WDUL uses the expression specially designed or modified, rather than required)

9D002

"Software" ~~required~~ specially designed or modified for the "production" of equipment controlled by 9A (except 9A018, 9A104, 9A110, 9A115, 9A120, 9A980, 9A990 ~~or 9A991~~ to 9A992), 9B (except 9B018, 9B115, 9B990 or 9B991).
Related Controls: (1) "Software" ~~"required"~~ specially designed or modified . . . (2) "Software" ~~"required"~~ specially designed or modified . . .

9D003

"Software" ~~required~~ specially designed or modified for the "use" of full authority digital electronic engine controls (FADEC) for propulsion systems controlled by 9A (except 9A018, 9A104, 9A110, 9A115, 9A120, 9A980, or 9A990 ~~or 9A991~~ to 9A992) or equipment controlled by 9B (except 9B018, 9B115, 9B990 or 9B991) . . .
~~TST~~ TSR
Related Controls: . . . (2) "Software" ~~"required"~~ specially designed or modified . . . (3) "Software" ~~"required"~~ specially designed or modified . . .

9D018

"Software" specially designed or modified for the "development", "production" or "use" of equipment controlled by 9A018 or 9B018.
(For consistency with WML 21.a)

9E001

. . . 9B (except 9B018, . . .), or 9D (except 9D018, . . .).
NS applies to "technology" for items controlled by 9A001.c, 9B001 to 9B009, ~~9D001 to 9D004~~ the NS portions of 9D001 to 9D003, or 9D004.
Related Definition: "Development" ~~or "production"~~ technology controlled by ~~9E~~ 9E001 . . .
Excluded from control are ~~technology~~ technical data . . .

9E003

a.2. . . . ~~1,643 K (1,370°C)~~ 1,813 K (1,540°C) . . .

9E018

"Technology" according to the General Technology Note for the "development", "production" or "use" of ~~equipment~~ items controlled by ~~2B018~~ 9A018, 9B018, or 9D018.

Part 772 Definitions of Terms

"All compensations available" (Cat. 2)

"All compensations available" means after all feasible measures available to the manufacturer to minimize all systematic positioning errors for the particular machine tool model are considered.

"Electronic ~~A~~assembly" (Cat. 3 ~~and~~, 4 and 5)

A number of electronic components . . . connected together to perform (a) specific function(s), . . .

"Asynchronous Transfer Mode" ("ATM") (Cat 5) -

A transfer mode in which the information is organized into cells; it is asynchronous in the sense that the recurrence of cells depends on the required or instantaneous bit rate. ~~(CCITT Recommendation I. 113)~~

~~"Bandwidth of one voice channel" (Cat. 5) -~~

~~In the case of data communication equipment designed to operate in one voice channel of 3,100 Hz, as defined in CCITT Recommendation G. 151.~~

"Basic gate propagation delay time" (Cat. 3) -

The propagation delay time value corresponding to the basic gate ~~utilized within a "family" of~~ used in a "monolithic integrated circuits". For a 'family' of "monolithic integrated circuits", ~~T~~this may be specified, ~~for a given "family",~~ either as the propagation delay time per typical gate within the given 'family' or as the typical propagation delay time per gate within the given 'family'.

~~Note~~ N.B. . . .

Technical Note

'Family' consists of all integrated circuits to which all of the following are applied as their manufacturing methodology and specifications except their respective functions:

a. The common hardware and software architecture;

b. The common design and process technology; and

e. The common basic characteristics.

~~"Beat length" (Cat. 6) -~~

~~The distance over which two orthogonally polarized signals, initially in phase, must pass in order to achieve a 2 pi radian(s) phase difference.~~

"Circulation~~" (~~controlled anti-torque direction control systems~~)~~" (Cat. 7) -

~~U~~se Control systems using air blown . . .

"Civil aircraft" (Cat. 1, 7 and 9) -

~~Only t~~Those "aircraft" . . .

"Composite" (Cat. 1, 2, 6, 8 and 9) . . .

"Composite theoretical performance." ("CTP") - (Cat. 3 and 4)

~~"Computer using facility." (Cat. 4) -~~

~~The end-user's contiguous and accessible facilities:~~

~~(a) Housing the "computer operating area" and those end user functions that are being supported by the stated application of the elctronic computer and its related equipment; and~~

~~(b) Not extending beyond 1,500 meters in any direction from the center of the "computer operating area".~~

~~Note: "Computer operating area": the immediate contiguous and accessible area around the electronic computer, where the normal operating, support and service functions take place.~~

"Computing element" (Cat. 4) -

The smallest computational unit that produces an arithmetic or logic result.

~~"Cryptanalysis" (Cat. 5) -~~

~~The analysis of a cryptographic system or its inputs and outputs to derive confidential variables or sensitive data including clear text. (ISO 7498-2-1988(E), paragraph 3.3.18)~~

~~"Datagram." (Cat 4 and 5) -~~

~~A self-contained, independent entity of data carrying sufficient information to be routed from one source to the destination data terminal equipment without reliance on ear-~~

~~lier exchanges between this source and destination data terminal equipment and the transporting network.~~

"Electronically steerable phased array antenna" (Cat. 5 and 6) -

An antenna which forms a beam by means of phase coupling, (i.e., the beam direction is controlled by the complex excitation coefficients of the radiating elements) and the direction of that beam can be varied (both in transmission and reception) in azimuth or in elevation, or both, by application~~, both in transmission and reception,~~ of an electrical signal.

"End-effectors" (Cat. 2) -

~~"End-effectors" include g~~Grippers . . .

"Expert systems" (Cat. 4 and 7) - . . .

~~"Fast select." (Cat. 4 and 5) –~~

~~A facility applicable to virtual calls that allows data terminal equipment to expand the possibility to transmit data in call set-up and clearing "packets" beyond the basic capabilities of a virtual call,~~

~~Note: "Packet": a group of binary digits including data and call control signals that is switched as a composite whole. The data, call control signals, and possible error control information are arranged in a specified format.~~

~~"Flexible manufacturing unit" . . .~~

~~"Fluoride fibers" (Cat. 6) -~~

~~Fibers manufactured from bulk fluoride compounds.~~

~~"Gateway" (Cat. 5) . . .~~

~~"Generic software" (Cat 5) . . .~~

~~"ISDN" - See "Integrated Services Digital Network"~~

"Instantaneous bandwidth" (Cat. 3 and 5) . . .

~~"Integrated Services Digital Network" (Cat 5). . .~~

~~"MBTR"- see "Maximum Bit Transfer Rate"~~

~~"Maximum Bit Transfer Rate" (Cat 4) . . .~~

~~"MBTR" (bits per second) . . .~~

~~"Most immediate storage" (Cat 4) . . .~~

~~"Motion control board" (Cat 2) . . .~~

"Network access controller" (Cat. 4 ~~and 5~~) . . .

"Noise level" (Cat 6)

. . .~~S\2\p+8No(fs-f\1\) where Spp~~ $S^2_{pp} = 8N_o(f_2-f_1)$, where S_{pp} . . . ~~No~~ N_o . . .

~~(e.g., (nanotesla)\2VHz) and (f2-f1)~~ (e.g., (nanotesla)^2/Hz) and (f_2-f_1) . . .

"Object code" (Cat. 4 and 9) . . .

~~"Optical fiber preforms" (Cat 5 and 6) . . .~~

~~"PABX" (Cat 5) . . .~~

~~"Part program" (Cat 2) . . .~~

"Personalized smart card" (Cat 5) -

A smart card containing a microcircuit~~, in accordance with ISO/IEC 7816,~~ which has been programmed ~~by the issuer~~ for a specific application and cannot be ~~changed~~ reprogrammed for any other application by the user.

~~"Positioning accuracy" (Cat 2) . . .~~

~~"Private authomatic branch exchange" (Cat 5) . . .~~

"Program" (Cat. 2, 4, ~~and~~ 5 and 6) . . .

"Real time processing" (Cat. 2 ~~and~~, 4, 6, and 7)

"Required" (Cat. 5, 6, and 9; GTN) -

As applied to "technology" ~~or "software"~~, refers to only that portion of "technology" ~~or "software"~~ which is peculiarly responsible for achieving or ~~extending~~ exceeding the controlled performance levels, characteristics or functions. Such "required" "technology" ~~or "software"~~ may be shared by different products. For example, assume product "X" is controlled if it operates at or above 400 MHz and is not controlled if it operates below 400 MHz. If production technologies "A", "B", and "C" allow production at no more than 399 MHz, then technologies "A", "B", and "C" are not "required" to produce the controlled product "X". If technologies "A", "B", "C", "D", and "E" are used together, a manufacturer can produce product "X" that does ~~not~~ operate at or above 400 MHz. In this example, technologies "D" and "E" are "required" to make the controlled product and are themselves controlled under the General Technology Note. (See the General Technology Note).

~~"SDH" - See "synchronous digital hierarchy" (Cat 5) . . .~~

~~"SONET" - See "synchronous optocal network" (Cat 5)~~

"Signal processing" (Cat 3, 4 ~~and~~, 5, and 6) . . ..

~~"Simple educational devices" (Cat 3) . . .~~

"Source code" (Cat 4, 5, 6, 7, and 9) . . .

~~"Sputtering" (Cat 4) . . .~~

~~"Swept frequency network analyzers" (Cat 3) . . .~~

~~"Switch fabric" (Cat 5) . . .~~
~~"Synchronous digital hierarchy" (Cat 5) . . .~~
~~"Synchronous optical network"(Cat 5) . . .~~
"Systems tracks" (Cat 6) . . .
~~"Telecommunications transmission equipment" (Cat 5) . . .~~
~~"Two dimensional Vector Rate" (Cat 4) . . .~~
"Vector Rate" (Cat 4) - See ~~"Two dimensional Vector Rate";~~ "Three dimensional Vector Rate".

APPENDIX 4-3 CCL Revisions to Conform with MTCR

This Appendix consists of informal suggestions, in line-in ~~line-out~~ form, to indicate how items on the Commerce Control List (CCL) might be revised to conform with multilaterally-agreed Missile Technology Control Regime (MTCR) texts or to remove internal inconsistencies.

These revisions are not in effect and may never be

Explanatory material appears in parentheses. It appears the first time the issue is raised and is generally not repeated for subsequent instances of the same issue.
This Appendix is based on CCL texts in effect June 15, 2000, and on the latest publicly available MTCR texts.
For texts of the MTCR General Technology Note and of the MTCR definition of "technology", see Appendix 4-6

1A002

MT applies to "composite" structures or laminates that are specially designed for use in "missiles" or "missile sybsystems".

(To conform with MTCR 8.a;
the definition of "missile subsystems" in this Appendix is based on MTCR 2)

1B001

MT applies to ~~entire entry except 1B001.d.4 and .f~~ the following for the production of structural "composites" usable in "missiles": 1B001.a, b except tow placement machines, c, d.1-3, and e.

(MTCR 6 is limited to equipment for the production of structural composites usable in "missiles";
MTCR 6.b does not cover 1B001.b tow-placement machines)

1B018

MT applies to ~~equipment for the "production" of rocket propellants~~ portion of 1B018 also described in 1B115 or 1B117.

("or 1B117" would be deleted if 1B115 and 1B117 were combined as suggested below)

1B101

Equipment, other than that controlled by 1B001, for the production of structural "composites " usable in "missiles", as follows, and specially designed components and accessories ~~thereof~~ therefor.

(MTCR 6 is limited to equipment for the production of structural composites usable in "missiles")

1B115

"Production equipment" for ~~the production, handling or acceptance testing of liquid~~ propellants or propellant constitutents ~~controlled by 1C011, 1C111 or on the U.S. Munitions List~~ as follows (see List of Items Controlled), and specially designed components therefor.

~~**1B117**~~

~~"Production equipment", as follows (see List of Items Controlled) for the production, handling or acceptance testing of solid propellants or propellant constitutents controlled by 1C011, 1C111 or on the U.S. Munitions List~~

(MTCR 5 covers mixing, curing, casting, pressing, machining, and extruding in addition to production, handling or acceptance testing. Lists in 1C011, 1C111, and the U.S. Munitions List include undifferentiated liquid and solid items. Those lists include more than the items listed in MTCR 4, to which reference is made in MTCR 5.a, .b, .c.3, and .c.4. They also omit some items listed in MTCR 4.)

Related Controls: ~~(1) For equipment specially designed for the production of military propellants or propellant constituents, see the U.S. Munitions List. (2) Items when specifically designed, developed, configured, adapted or modified to produce an item on the USML are subject to the export licensing authority of the U.S. State Department, Office of Defense Trade Controls (see 22 CFR Part 121). (3) This entry does not control equipment for the "production", handling and acceptance testing of boron carbide.~~ N/A

(Nothing on the USML appears to cover such equipment or items. In addition to boron carbide, which is a portion of 1C011.b, guanidine nitrate 1C011.c and scores of items on the USML are omitted from MTCR 4, to which MTCR 5 refers.)

Items:

a. Equipment for production, handling or acceptance testing of liquid propellants or propellant constitutents ~~controlled by 1C0 11, 1C111 or on the U.S. Munitions List~~ described in the Note below;

b. Equipment as follows:

1 (text from 1B117.a)
2 (text from 1B117.b)
3 Fluid energy mills usable for grinding or milling substances specified in ~~1C011, 1C111 or on the U.S. Munitions List~~ the Note below;
4 Metal powder "production equipment" usable for the "production", in a controlled environment, of spherical or atomized materials specified in ~~1C011~~ 1C011.a, the boron portion of 1C011.b, 1C111.a.1. or a.2., or ~~on the U.S. Munitions List~~ in 22 CFR 121.12(a)(1-3), including: a., b., c. (text from 1B117.d.1, d.2, d.3)

c. ~~"Production equipment"~~ Equipment, other than equipment described in 1B115.b, for production, handling, mixing, curing, casting, pressing, machining, extruding or acceptance testing of solid propellants or propellant constituents described in ~~1C011 or 1C111, or on the U.S. Munitions List~~ the Note below, ~~other than those described in 1B117.a through d.~~;

(The "other than" phrase should modify equipment rather than propellants or propellant constitutents. Specially designed components should be included in the item heading, in which event, a sub-item for this purpose becomes unnecessary.)

Note: The propellants or propellant constituents referred to in 1B115.a, b.3, and c. are:

a. Specified in 1C011.a, the boron portion of 1C011.b, or 1C111;
b. Specified in 22 CFR 121.12(a)(1, 2, 3, 4, 6, 7, 8, 19, 20, 25, 26, 31, 32, 34), (b)(1, 3, 6, 14, 16, 17, 21, 28, 31), or (f)(1);
c. Composite and composite modified double base propellants; or

d. High energy density materials, such as borron slurry, having an energy density of 40×10^6 J/kg or greater.

1C001

MT applies to ~~entire entry~~ items controlled by 1C001 for applications "usable" for "missiles" or "missile subsystems".

(To conform with MTCR 17 heading)

1C007

MT applies to ~~items described in 1C007.d (and .f when the dielectric constant is less than 6 at frequencies from 100 Hz to 10,000 MHz) for use in missile radomes~~ portion of 1C007.d also described in 1C107.

(MTCR 8.d contains other limits not in 1C007.d or .f, namely, usable in "missiles" and "for use in missile radomes, and bulk machinable silicon-carbide reinforced unfired ceramic usable for nose tips.")

1C010

MT applies to portion of 1C010.e also described in 9A110.

1C011

MT applies to 1C011.a ~~and .b~~ and the following portion of .b: metal fuels consisting of 97 percent by weight of boron.

1C101

. . . ~~and their subsystems~~ or "missile subsystems".

(MTCR 17 limits the relevant subsystems to those listed in MTCR 2;
for suggested definition of "missile subsystems," see the end of this Appendix)

1C107

Graphite and ceramic materials usable in "missiles," not controlled by 1C007.

(For consistency with heading of MTCR 8 and with MT reason for control in 1C007.)

1C111

a.3.d. Chlorine trifluoride

b.1. ~~Carboxyl~~ Carboxyl
b.2. ~~Hydroxyl~~ Hydroxyl-terminated polybutadiene (HTPB), other than that controlled by the U.S. Munitions List (22 CFR 121.12 (a)(34))
d. Composite and composite modified double base propellants
e. High energy density materials such as boron slurry, having an energy density of 40×10^6 J/kg or greater.

(22 CFR 121.12(a)(6) explicitly excludes chlorine trifluoride, which is included in MTCR 4.d.1.e.)

1C116

Maraging steels (steels generally characterized by . . .) usable in "missiles" having . . .

(Usable in "missiles" is to conform with MTCR 8 heading)

1C117

Tungsten, molybdenum, and alloys of these metals usable in "missiles" in the form of . . .

(To conform with MTCR 8 heading)

1D002

MT applies to ~~"software" specially designed or modified for the "development" of "composites" controlled by 1A, 1B, or 1C entries for MT reasons~~ the portion of 1D002 also described in 1D101.

(MTCR 6 software is limited to that specially designed for 1B101 equipment; MTCR 8.a does not cover software)

1E001

"Technology" . . . for . . . 1A102,. . .
MT applies to "technology" for items controlled by 1A002, 1A102, . . . ~~1B117,~~ . . . 1C010,

1E002

MT applies to ~~1E002.e~~ portion of 1E002.e applicable to MT portion of 1C001.

1E101

"Technology" according to ~~the General Technology Note~~ MTCR "Related Technology" not controlled by 1E001or 1E002 for the "development", "production", or "use" of items controlled by 1A002, 1A102, . . . 1C010, . . . for MT reasons.

(Assumes MTCR "Related Technology" is broader than the Wassenaar GTN; see Appendix 4-6)

~~**1E102**~~

~~"Technology" according to the General Technology Note for the "development" of "software" controlled by 1D001, 1D101, or 1D103~~

(Made redundant by suggested revision of 1E101)

2B004

MT applies to ~~entire entry~~ portion of 2B004 also described in 2B104.

(MTCR 7.c, unlike 2B004, is limited to equipment designed or modified for densification and pyrolysis of structural composite rocket nozzles and reentry vehicle nose tips.)

2B009

MT applies to spin-forming machines combining the functions of spin-forming and flow forming; and flow-forming machines with more than two axes which can be coordinated simultaneously for contouring control and which are "usable in" the "production" of propulsion components and equipment (e.g., motor cases) for "missiles".

(To conform with MTCR 3 Note (1))

2B018

MT applies to ~~specialized machinery, equipment, and gear for producing rocket systems (including ballistic missile systems, space launch vehicles, and sounding rockets) and unmanned air vehicle systems (including cruise missile systems, target drones, and reconnaissance drones) usable in systems that are controlled for MT~~

~~reasons, including their propulsion systems and components, and pyrolytic deposition and densification equipment~~ portions of 2B018 also described in 1B001, 1B101, 1B115 to 1B117, 2B004, 2B009, 2B104, 2B109, 2B116, 6B008, 6B108, 7B001, 7B002, 7B003, 7B102, 7B103, 9B001 to 9B007, 9B105, 9B106, 9B115, 9B116, or 9B117 for MT reasons.

(MTCR 1 and 2 cover production equipment for only what is defined in "missiles" or "missile subsystems"; MTCR 19 does not control production equipment for other rocket systems or unmanned air vehicles; pyrolytic deposition and densification is not the only MTCR-listed production equipment which overlaps ML 18)

2B109

Unit: Equipment in number; ~~parts and accessories~~ components in $ value.

(2B109 does not control parts or accessories)

Note. 2B109 does not control machines that are not usable in the production of propulsion components and equipment (e.g., motor cases) for "missiles".

(To conform with MTCR 3 Note 1 last sentence.)

2B116

Vibration test systems, equipment, and components therefor not controlled by 9B018.b nor by 9B006 usable for "missiles" or "missile subsystems".

(WML 18.b, which would be transferred from 1B018.b to become 9B018.b per Appendix 4-2, and 9B006 also control vibration test equipment;
usable for "missiles" or "missile subsystems" is to conform with MTCR 15 heading)

a. . . . ~~controler~~ controller . . .

2D001

MT applies to "software" specially designed for the "use" of equipment controlled by 2B004 and 2B009 for MT reasons.

(MTCR 7.c covers "specially designed" software, but not "modified" software; EU interprets software in MTCR 7.c to be limited to "use")

2E101

"Technology" according to ~~the General Technology Note~~ MTCR "Related Technology" not controlled by 2E001or 2E002 for the "development", "production", or "use" of items controlled by... "use" of equipment or "software" controlled by 2B004, 2B009, 2B104, 2B109, 2B116, 2D001, or 2D101 for MT reasons.

(Not all of 2B004 and 2B009 is covered by MTCR 7.c or MTCR 3; some but not all of 2D001 is covered by MTCR 3, 7.c, and 15)

3A101

b. Accelerators usable for "missiles" or "missile subsystems" " capable of " ...

(To conform with MTCR 15 heading)

4A002

MT applies to hybrid computers combined with specially designed "software" for modelling, simulation, or design integration of ~~complete rocket systems and unmanned air vehicle systems that are usable in systems controlled for MT reasons~~ "missiles"or "missile subsystems". (MTCR 16 is limited to modelling, etc., of Item 1 "missiles" and of "missile subsystems" specified in Item 2; MTCR 16 does not include modelling, etc. of item 19 rocket systems)

4A003

~~MT applies to digital computers used as ancillary equipment for test facilities and equipment that are controlled by 9B005 or 9B006~~

(MTCR 15 covers no such ancillary equipment)

4A101

b. Designed as ruggedized ~~or "radiation hardened"~~

(4A001.a.2.a covers "radiation-hardened")

4A102

"Hybrid computers" "specially designed" for 'modelling,' simulation, or design integration of "missiles" or "missile subsystems".

Note 1: This control applies only when the equipment is supplied with software described in 7D103 or 9D103.
Note 2: The 'modelling' includes in particular the aerodynamic and thermodynamic analysis of the systems.

4D001

~~MT applies to "software" for equipment controlled by 4A003 4A001 for MT reasons~~

(MTCR 13 does not control software.)

4D002

~~MT applies to "software" for equipment controlled by 4E for MT reasons~~

(MTCR 13 does not control software;
MTCR 16 software is for equipment, not technology;
if, nevertheless, "MT applies . . ." is retained, ~~equipment~~ "technology")

~~4D102~~

~~"Software" specially designed or modified for the "development", "production", or "use" of equipment controlled by 4A101~~

(MTCR 13 does not control software.)

4E001

MT applies to "technology" for items controlled by 4A001 ~~to 4A003,~~ or 4A101~~, 4D001, 4D102 or 4D002~~ for MT reasons.

4E101

"Technology" according to MTCR "Related Technology" not controlled by 4E001 for the "development", "production", or "use" of items controlled by 4A001 or 4A101 for MT reasons.

5A101

Telemetering and telecontrol equipment "usable" for ~~"missiles"~~ unmanned air vehicles or rocket systems.

(for consistency with MTCR 12.d; "usable" is defined)

~~**5D101**~~

~~"Software" designed or modified for the "development", "production" or "use" of items controlled by 5A101~~

(MTCR 12.d does not control software)

5E101

"Technology" according to ~~the General Technology Note~~ MTCR "Related Technology" not controlled by 1E001or 1E002 for the "development", "production", or "use" of equipment controlled by 5A101.

~~**5E111**~~

~~"Technology" according to the General Technology Note for the "development", "production" or "use" of equipment controlled by 5D101~~

(If, nevertheless, 5E111 retained, ~~equipment~~ software

6A002

MT applies to ~~optical detectors in 6A002.a.1, a.3, and .e that are specially designed or rated as electromagnetic (including "lasers") and ionized particle radiation resistant~~ portion of 6A002 also described in 6A102.

(MTCR item 18.a applies to any "detectors", but only if "radiation hardened")

6A007

MT applies to 6A007.b and c when the accuracies in 6A007.b.1 and b.2 are met or exceeded and when for "missiles" and designed or modified for airborne or marine use.

(for "missiles" is to conform with MTCR 12 heading;
6A007.b covers ground use, whereas MTCR 12.c does not)

6A008

MT applies to ~~items that are designed for airborne applications and that are usable in systems controlled for MT reasons~~ the portion of 6A008 also described in 6A108.

(6A008 specifications differ in many respects from those in MTCR items 11(a) and 12(e); those MTCR items are

limited for use in "missiles," i.e., systems defined in MTCR Item 1, and do not include items for use in systems controlled for MT reasons because of MTCR items 2, 19, or 20)

6A107

Delete existing text and substitute Components specially designed for gravity meters (gravimeters) or gravity gradiometers meeting the specifications of 6A007.b and for "missiles".

(MTCR 12.c is identical to 6A007.b except that it controls components, whereas 6A007 does not, and it is limited to equipment for "missiles")

6A108

(MTCR does not include the Related Definitions)

6B008

MT applies to ~~entire entry~~ specially designed systems usable for "missiles" or "missile subsystems".

(For consistency with MTCR 17.d)

6B108

Systems specially designed for radar cross section measurement usable for "missiles" ~~and their~~ or "missile subsystems ".

(MTCR 17.d is limited to systems usable for "missiles" and for those "missile" subsystems which are listed in MTCR 2)

6D001

MT applies to "software" for equipment controlled by 6A008 ~~or 6B008~~ for MT reasons.

(MTCR 17.d does not cover software)

6D002

MT applies to "software" for equipment controlled by 6A008 ~~or 6B008~~ for MT reasons.

(MTCR 17.d does not cover software)

6D102

"Software" specially designed for the "use" of equipment controlled by ~~6A108~~ 6A108.a or 6A108.b.2.

(MTCR 12.e.1 does not control software)

6D103

"Software" for "missiles" that processes post-flight recorded data ~~obtained from system controlled by 6A108.b~~, enabling determination of vehicle position throughout its flight path.

(MTCR 12 is limited to software for "missiles";
MTCR 12.e.3 is not limited to data obtained from 12.e.1, 2)

6E101

"Technology" according to ~~the General Technology Note~~ MTCR "Related Technology" not controlled by 6E001or 6E002 for the "development", "production", or "use" of items controlled by "Technology" . . . for the "use" of . . . 6A002, 6A007.b and .c, 6A008, 6A102, 6A107, 6A108, 6B108, 6D001, 6D002, 6D102 or 6D103 for MT reasons.

~~**6E102**~~

~~"Technology" according to the General Technology Note for the "use" of "software" controlled by 6D001 and 6D002 for MT reasons.~~

(Would be made redundant by changes in 6E101)

7A001

MT applies to ~~entire entry~~ portion of 7A001.a and b also described in 7A101 and to 7A001.c if continuous output.

(MTCR 9.c threshold and linearity differ from 7A001.a and b bias stability and scale factor stability; MTCR 9.e is narrower than the comparable 7A001.c, being limited to continuous output)

7A002

MT applies to ~~entire entry~~ portion of 7A002.a also described in 7A102 and to 7A002.b if continuous output.

(MTCR 9.d is narrower than the comparable 7A002.a, being limited to gyros usable in "missiles"; MTCR 9.e is narrower than the comparable 7A002.b, being limited to continuous output)

7A003

MT applies to ~~entire entry~~ portion of 7A003 also described in 7A103.a.

(MTCR 9.f is limited to equipment or systems using 9.c or 9.e accelerometers or 9.d or 9.e gyros, whereas 7A003 is not so limited)

7A005

MT applies to portion of 7A005 also described in 7A105.

7A006

MT applies to ~~entire entry~~ portion of 7A006 also described in 7A106.

7A103

a. Inertial or other equipment using accelerometers or gyros controlled by 7A001, or 7A002 for MT reasons, or 7A101 or 7A102 and systems incorporating such equipment.

(To conform with MTCR 9.f)

7A105

. . . having any of the following characteristics:

a. Capable of providing navigation information under the following operational conditions:

1. At speeds in excess of 515 m/sec (1,000 nautical miles/hour); and
2. At altitudes in excess of 18 km (60,000 feet); or

b. Designed or modified for use with the unmanned vehicle portion of the definition of "missile".

7B001

Test, calibration or alignment equipment specially designed for equipment controlled by ~~7A (except 7A994)~~ 7A001 to 7A007, 7A101 to 7A106, 7A115 to 7A117, including items, or portions thereof, subject to the export licensing authority of the U.S. Department of State, Office of Defense Trade Controls.

MT applies to ~~entire entry~~ equipment specially designed for 7A004, 7A101 to 7A106, 7A115 to 7A117 or the MT portions of 7A001 to 7A003, 7A005, 7A006.

7B003

Equipment specially designed for the "production" of equipment controlled by ~~7A (except 7A994)~~ 7A001 to 7A007, 7A101 to 7A106, 7A115 to 7A117, including items, or portions thereof, subject to the export licensing authority of the U.S. Department of State Office of Defense Trade Controls.

MT applies to ~~entire entry~~ equipment specially designed for 7A004, 7A101 to 7A106, 7A115 to 7A117 or the MT portions of 7A001 to 7A003, 7A005, 7A006.

7B101

. . . designed or modified to be used with equipment controlled by ~~7A001~~ 7A004 or 7A101-7A104, or the MT portions of 7A001-7A003.

7B102

~~Equipment, other than those controlled by 7B002, designed or modified to characterize mirrors, for laser gyro equipment as follows (see List of Items Controlled)~~

a. ~~Scatterometers have a measurement accuracy of 10 ppm or less (better);~~
~~b.~~ Reflectometers having a measurement accuracy of 50 ppm or less (better);
~~c. Profilometers having a measurement accuracy of 0.5 nm (5 Angstroms) or less (better).~~

(7B002 covers 7B102.a and 7B102.c)

7B104

Equipment, designed or modified to be used with equipment controlled by ~~7A001~~ 7A004 or 7A101-7A104, or the MT portions of 7A001-7A003 . . .

a.1. . . . ~~3 Kgm~~ 3 kg

e. Centrifuges ~~able to impart~~ "capable of" imparting . . .

(MTCR defines the expression "capable of")

7D001

MT applies to ~~entire entry~~ "software" specially designed for equipment controlled by 7A001 to 7A006, 7A101 to 7A106, 7B001 to 7B003, 7B101 to 7B104 for MT reasons.

(MTCR covers specially designed software, but not modified software; MTCR does not cover software for the non-MT portions of 7A001 to 7A003, 7A005, 7A006, 7B001, or 7B003.)

7D002

MT applies to ~~entire entry~~ portion of 7D002 for "source code" specially designed for equipment controlled by 7A003 or 7A103 for MT reasons.

(MTCR controls only specially designed software; MTCR does not control "software" for uncontrolled equipment)

7D003

MT applies to ~~entire entry~~ portion of 7D003 also described in 7D001, 7D002, 7D101, 7D102 or 7D103 for MT reasons.

(MTCR does not control software pursuant to 7D003 specifications, although there may be some overlap between 7D003 and MTCR specifications)

7D101

"Software" specially designed for the "use" of equipment controlled by 7A001 to 7A006, 7A101 to 7A106, 7B001 to 7B003, 7B101 to 7B104 for MT reasons.

(MTCR does not cover software for the non-MTCR portions of 7A001 to 7A006, 7B001 to 7B003)

7D102

Integration "software" specially designed for the equipment controlled by 7A003 or 7A103 for MT reasons.

(MTCR 9.f is limited to specially designed software; MTCR 9.f does not cover software for the non-MTCR portion of 7A003)

7E001

MT applies to ~~entire entry~~ "technology" for items controlled by 7A001 to 7A006, 7A101 to 7A106, 7B001 to 7B003, 7B101 to 7B104, 7D001 to 7D003, or 7D101 to 7D103 for MT reasons.

(MTCR does not cover technology for the non-MT portions of 7A001 to 7A006, 7B001 to 7B003, or 7D001 to 7D003)

7E002

MT applies to ~~entire entry~~ "technology" for items controlled by 7A001 to 7A006, 7A101 to 7A106, 7B001 to 7B003, 7B101 to 7B104 for MT reasons.

(MTCR does not cover technology for the non-MT portions of 7A001 to 7A006 or 7B001 to 7B003)

7E003

MT applies to ~~entire entry~~ "technology" for equipment controlled by 7A001 to 7A004 for MT reasons.

(MTCR does not cover technology for non-MTCR portions of 7A001 to 7A003)

7E004

MT applies to ~~entire entry~~ portion of 7E004.b.5 also described in 7E104.

7E101

"Technology", other than "technology" controlled by 7E001, 7E002, or 7E003, according to ~~the General Technology Note~~ MTCR "Related Technology" for the "development", "production", or "use" of equipment or "software" controlled by . . . 7D102 for MT reasons.

9A006

N.B. See also 9A106 and 9A108. . . .

9A101

Unit: ~~Equipment in~~ number~~; parts and accessories in $ value~~
(9A101 does not control parts or accessories)

9A105

Liquid propellant rocket engines, other than those controlled by 9A005, as follows:
N.B. See also 9A119 . . .
Items:

a. Liquid propellant rocket engines "usable in" "missiles", other than those controlled by 9A005, having a total impulse capacity of 1.1 MNs or greater;
b. Liquid propellant rocket engines "usable in" rockets with a range capability of 300 km or greater, other than those controlled by 9A005 or 9A105.a, having a total impulse capacity of 0.841 MNs or greater.
(9A110 refers to 9A105.a)

9A106

Unit: ~~Equipment and components in~~ number; ~~parts and accessories in $ value~~
(9A106 does not control parts or accessories)

9A108

. . . "usable in" rockets with a range capability of 300 km or greater, as follows, specially designed for solid rocket propulsion systems:
(These items . . .)
Items:

a. Rocket motor cases, 'interior lining' and 'insulation' therefor;

Note: 'Interior lining' is suited for the bond interface between the solid propellant and the case or insulating liner. It is usually a liquid polymer based dispersion of refractory or insulating

material, e.g., carbon filled HTPB or other polymer with added curing agents to be sprayed or screeded over a case interior. 'Insulation' is intended to be applied to the components of a rocket motor, i.e., the case, nozzle inlets, or case closures. It includes cured or semi-cured compounded rubber sheet stock containing an insulating or refractory material. It may also be incorporated as stress relief boots or flaps.

b. Rocket nozzles;

c. Thrust vector control sub-systems.

Technical Note:

Examples of methods of achieving thrust vector control specified in 9A108.c are:

1. Flexible nozzle;
2. Fluid or secondary gas injection;
3. Movable engine or nozzle;
4. Deflection of exhaust gas stream (jet vanes or probes); or
5. Thrust tabs.

(To conform with EU; 9A108.a and b are MTCR 3.c propulsion components, whereas 9A108.c is a MTCR 2 missile subsystem)

9A110

. . . other than those controlled by entry 1C010 or 9A010, specially designed for use in "missiles" or ~~the subsystems controlled by entries 9A005, 9A007, 9A105.a, 9A106 to 9A108, 9A116 or 9A119~~ "missile subsystems" and

(1C010 Related Controls describes overlap with 9A110; MTCR 8.a covers composite structures, laminates, and manufactures thereof for use in MTCR 2 subsystems, which omit the portion of 9A005 not overlapping 9A105.a, 9A007.b-e, 9A106.a and .b, 9A107, 9A108.a and .b, 9A117, and 9A118 but which includes 7A117 and "weapon or warhead safing, arming, fuzing, and firing mechanisms"; there is thus a need for a definition of "missile subsystems" corresponding with MTCR 2)

Related Controls: (1) See also 1A002, 1A102, 1A202, 1C010, ~~and~~ 1C210, and 9A010.

9A115

Launch support equipment "designed or modified" for "missiles", as follows: (These items . . .)
Items:

a. Apparatus and devices for handling, control, activation or launching;
b. Vehicles for transport, handling, control, activation or launching.

(To conform with EU and with MTCR 12.a and b)

9A116

Reentry vehicles, "usable in" "missiles", and equipment "designed or modified" therefor, as follows: (These items . . .)
Items:

a. Reentry vehicles;
b. Heat shields and components therefor fabricated of ceramic or ablative materials;
c. Heat sinks and components therefor fabricated of light-weight, high heat capacity materials;
d. Electronic equipment "specially designed" for reentry vehicles.

(For consistency with EU and MTCR 2.b)

9A117

. . . "usable in" . . .

9A118

Devices to regulate combustion "usable in" engines which are "usable in" ~~rockets with a range capability greater than 300 km or greater, controlled by 9A011 or 9A111~~ "missiles" (These items . . .)

(For consistency with MTCR 3.b)

9A119

Individual rocket stages, "usable in" rockets with a range capability ~~greater than~~ of 300 km or greater, other than those controlled by 9A005, 9A007, 9A009, 9A105, 9A107, ~~and~~ or 9A109. (These items . . .)

(For consistency with MTCR 2.a and 20.a)

9A120

. . . "capable of" . . .

Unit: ~~Equipment in~~ number~~; parts and accessories in $ value~~

(9A120 does not cover parts or accessories)

9A121

Weapon or warhead safing, arming, fuzing, and firing mechanisms usable in "missiles"

(To conform with MTCR 2.f.)

9B001

MT applies ~~only~~ to ~~equipment for engines that meet the characteristics described in 9A001~~ portion of 9B001 for "production equipment" or "production facilities" specially designed for "missile propulsion components or equipment"

(To conform with MTCR 3; there is a need for a definition of "missile propulsion components or equipment" to correspond with MTCR 3 and to include the portion of 9A001 for MT reasons)

9B002

MT applies ~~only~~ to ~~equipment for engines that meet the characteristics described in 9A001~~ portion of 9B002 for "production facilities" or "production equipment" specially designed for "missile propulsion components or equipment"

(To conform with MTCR 3; there is a need for a definition of "missile propulsion components or equipment" to correspond with MTCR 3 and to include the portion of 9A001 for MT reasons)

9B003

MT applies ~~only~~ to ~~equipment for engines that meet the characteristics described in 9A001~~ portion of 9B003 for "production facilities" or "production equipment" specially designed for "missile propulsion components or equipment".

(To conform with MTCR 3; there is a need for a definition of "missile propulsion components or equipment" to correspond with MTCR 3 and to include the portion of 9A001 for MT reasons)

9B004

MT applies ~~only~~ to ~~equipment for engines that meet the characteristics described in 9A001~~ portion of 9B004 for "production facilities" or "production equipment" specially designed for "missile propulsion components or equipment".

(To conform with MTCR 3 and Note 2.a; there is a need for a definition of "missile propulsion components or equipment" to correspond with MTCR 3 and to include the portion of 9A001 for MT reasons)

9B005

~~MT applies to entire entry MT Column 1~~

(MTCR 15.b controls specified wind tunnels but not control systems, instrumentation, or data processing equipment therefor)

9B006

MT applies to portion of 9B006 also described in 2B116 or 9B106.

(9B006 appears to overlap 2B116 and 9B106.)

9B007

MT applies to ~~entire entry~~ portion of 9B007 also described in 9B115 to 9B117.

(9B007 is broader than MTCR 2 and 20, which are limited to equipment to produce specified types of rocket motors)

9B105

Wind tunnels, not controlled by 9B018, for speeds of Mach 0.9 or more usable for "missiles" ~~and their subsystems~~ or "missile subsystems".

(MTCR 15 is limited to items usable in the subsystems listed in MTCR 2)

9B106

Environmental chambers and anechoic chambers, not controlled by 9B006 or 9B018.b, as follows:

(MTCR 15 overlaps Wassenaar ML 18.b.; ML 18.b, an obsolete version of which is now in existing 1B018.b,

should be moved to a new 9B018, since environmental chambers test more than just materials)

9B115

"Specially designed" "production equipment", not controlled by 7B103 or 9B018, for the ~~systems, sub-systems, and components controlled by 9A005 to 9A009, 9A011, 9A101, 9A105 to 9A109, 9A111, 9A116 to 9A119~~ following: ~~(These items are subject to the export licensing authority of the U.S. Department of State, Office of Defense Trade Controls. See 22 CFR part 121.)~~
Items:

a. "missile subsystems";
b. "missile propulsion components and equipment"; or
c. "other rocket subsystems"

(To conform with MTCR 2, 3, and 20 "production equipment"; ITAR does not explicitly control such "production equipment" and it is believed that USML Category XXI, any article n.e.s. specifically designed or modified for military purposes, has not otherwise been interpreted to control production equipment; MTCR 2, 3, and 20 omit the portions of 9A005 and 9A006 not overlapping 9A105 and omit all of 9A106, 9A007.b-e, 9A008, and 9A009.b but include 7A117, the MT portion of 9A001, and "weapon or warhead safing, arming, fuzing, and firing mechanisms"; there is thus a need for a definition of "missile subsystems" to correspond with MTCR 2, "missile propulsion components and equipment" to correspond with MTCR, 3 and "other rocket subsystems" to correspond with MTCR 20)

Related Controls: Though many of the items listed in the definitions of "missile subsystems," "missile propulsion components and equipment," and "other rocket subsystems" are subject to the export licensing authority of the Department of State, Office of Defense Trade Controls (22 CFR part 121), rather than to the export licensing authority of BXA, the "production equipment" related to these items is subject to the export licensing authority of BXA.

9B116

Specially designed "production facilities", not controlled by 7B103 or 9B018, for the ~~systems, sub-systems, and components controlled by 9A004 to 9A009, 9A011, 9A101, 9A104 to 9A109, 9A111, 9A116 to 9A119~~ following: ~~(These items are subject to the export licensing authority of the U.S. Department of State, Office of Defense Trade Controls. See 22 CFR part 121.)~~
Items:

a. "missiles";
b. "missile subsystems";
c. "missile propulsion components and equipment"; or
d. "other rocket subsystems"

(To conform with MTCR 1, 2, 3, and 20 "production equipment"; ITAR does not explicitly control such "production equipment" and it is believed that USML Category XXI, any article n.e.s. specifically designed or modified for military purposes, has not otherwise been interpreted to control production equipment; MTCR 1, 2, 3, and 20 omit 9A004, 9A104, the portions of 9A005 and 9A006 not overlapping 9A105 or 9A106, 9A007.b-e, 9A008, and 9A009.b but include "missiles," 7A117, the MT portion of 9A001, and "weapon or warhead safing, arming, fuzing, and firing mechanisms"; there is thus a need for a definition of "missile subsystems" to correspond with MTCR 2, "missile propulsion components and equipment" to correspond with MTCR 3, and "other rocket subsystems" to correspond with MTCR 20)

Related Controls: Though many of the items listed in the definitions of "missiles," "missile subsystems," "missile propulsion components and equipment," and "other rocket subsystems" are subject to the export licensing authority of the Department of State, Office of Defense Trade Controls (22 CFR part 121), rather than to the export licensing authority of BXA, the "production equipment" related to these items is subject to the export licensing authority of BXA.

9B117

Test benches and test stands , not controlled by 9B018, for solid or liquid propellant rockets or rocket motors usable for "missiles" or

"missile subsystems" having either of the following characteristics:

(MTCR 15.c is limited to test equipment usable for "missiles" or "missile subsystems")

9D001

"Software" ~~required~~ specially designed or modified for the "development" of equipment or "technology" controlled by 9A (except 9A018, 9A104, 9A110, 9A115, 9A120, 9A980, 9A990 or 9A991), 9B (except 9B018, 9B115, 9B990 or 9B9991) or 9E003.

(Re 9A104 and 9A120, MTCR 19 does not control software; re 9A110, MTCR 8.a does not control software; re 9A115, MTCR 12.a,b do not control software; re 9B115, MTCR "production equipment" does not control software)

MT applies to "software" specially designed for equipment controlled by 9A001, 9A005-9A009, 9A011, 9A101, 9A106, ~~9A110, 9A120,~~ 9B001, 9B002, 9B003, 9B004, ~~9B005,~~ 9B007, 9B105, 9B106, 9B116 and 9B117 for MT reasons.

(MTCR controls specially designed software but not modified software; there is no MTCR overlap with 9B005)

9D002

"Software" ~~required~~ specially designed or modified for the "production" of equipment controlled by 9A (except 9A018, 9A104, 9A 110, 9A115, 9A120, 9A980 9A990 or 9A991), 9B (except 9B018, 9B115, 9B990 or 9B9991).

MT applies to "software" specially designed for equipment controlled by 9A001, 9A005-9A009, 9A011, 9A101, 9A106, ~~9A110, 9A120,~~ 9B001, 9B002, 9B003, 9B004, ~~9B005,~~ 9B007, 9B105, 9B106, 9B116 and 9B117 for MT reasons.

9D003

"Software" ~~required~~ specially designed or modified for the "use" of full authority digital electronic engine controls (FADEC) for propulsion systems controlled by 9A (except 9A018, 9A104, 9A110, 9A115, 9A120, 9A980, or 9A990 ~~or 9A991~~ to 9A992) or equipment controlled by 9B (except 9B018, 9B115, 9B990 or 9B991) . . .

MT applies to "software" ~~required~~ specially designed for the "use" of FADEC for gas turbine aero engines controlled by 9A001, 9A101, or 9A106~~, or 9A110~~ for MT reasons.

(9A001 also controls engines; re 9A110, MTCR 8.a does not control software)

9D004

MT applies to ~~entire entry~~ portion of 9D004.a.for equipment controlled by 9B105, and portions of 9D004.b. and d. for equipment controlled by the MT portion of 9A001 or by 9A101.

(To conform with MTCR 3.a, 15.a and 15.b)

9D102

"Software" specially designed for the "use" of items controlled by 9A101, 9A106, ~~9A110, and 9A120~~

9D103

"Software" with 4A002 or 4A102 for MT reasons specially designed for modelling, simulation or design integration of "missiles", or ~~the subsystems controlled by 9A005, 9A007, 9A105.a, 9A106, 9A108, 9A116 or 9A119~~ "missile subsystems".

(MTCR 16 is limited to software "with related specially designed hybrid . . . computers"; MTCR 2 subsystems omit the portion of 9A005 not overlapping 9A105.a and omit all of 9A007.b-e, 9A106.a and .b, 9A107, 9A108.a and .b, 9A117, and 9A118 but include 7A117 and "weapon or warhead safing, arming, fuzing, and firing mechanisms"; there is thus a need for a definition of "missile subsystems" corresponding with MTCR 2)

9E001

MT applies to "technology" for items controlled by . . . ~~9B005,~~ . . . for MT reasons.

(MTCR does not cover 9B005 wind tunnel control systems)

9E002

MT applies to "technology" for items controlled by . . . ~~9B005,~~ . . . for MT reasons.

(MTCR does not cover 9B005 wind tunnel control systems)

9E101

"Technology" according to ~~the General Technology Note~~ MTCR "Related Technology" not controlled by 9E001or 9E002 for the "development", ~~or~~ "production", or "use" of ~~goods~~ items controlled by 9A001, 9A005 to 9A011, 9A101, 9A104 to 9A111 or 9A115 to 9A120 , 9B001 to 9B005, 9B105, 9B106, 9B115 to 9B117, 9D001 to 9D004, 9D101 to 9D103 for MT reasons.

Related Controls: . . . 9A110 that are specially designed for use in ~~missile systems and subsystems~~ "missiles" or "missile subsystems" . . .

Related Controls: "Technology" controlled by 9E101 for items ~~in 9A101.b, 9A104, 9A105, 9A109, 9A110 that are specially designed for use in missile systems and subsystems, 9A111, 9A115 and 9A116 to 9A120~~ subject to export licensing jurisdiction of the Department of State and for 9A120 are subject to the export licensing authority of the U.S. Department of State, Office of Defense Trade Controls. (see 22 CFR part 121)

(The only Category 9 commodity items subject to Commerce jurisdiction for which technology is subject to State jurisdiction are 9A004 and 9A120 and no part of 9A004 is controlled for MT reasons)

~~**9E102**~~

~~"Technology" according to the General Technology Note for the "use" of goods controlled by 9A004 to 9A011, 9A101, 9A104 to 9A111, 9A115 to 9A120, 9B105, 9B106, 9B115, 9B116, 9B117, 9D101 or 9D103~~

(Made redundant by changes in 9E101)

Part 772 - Definitions of Terms

"Missile propulsion components or equipment" (MTCR context) (Cat.9) —

Items controlled by 9A009, 9A011, 9A101, 9A106.a, b, d, 9A108.a, b, 9A109, 9A111, 9A117, 9A118, the MT portion of 9A001, or the portions of 9A006 or 9A008 also described in 9A106.a, b, d or 9A108.a, b.

"Missile subsystems" (MTCR context) (Cat. .7, 9) -

Items controlled by 7A117, 9A007.a, 9A105.a, 9A106.c, 9A108.c, 9A116, 9A121, the portion of 9A119 "usable in" "missiles", or the portions of 9A006 or 9A008 also described in 9A106.c or 9A108.c.

"Other rocket subsystems" (MTCR context) (Cat. 9) -

Items controlled by 9A105.b, 9A107, the portion of 9A119 "usable in" 9A104 or 9A120 but not in "missiles", or the portions of 9A005 or 9A007 also described in 9A105.b or 9A107

"Other rockets" (MTCR context) (Cat. 9) -

Items controlled by 9A104 or 9A120.

"Production facility" (MTCR context) (Cat 7, 9) -

Equipment and specially designed "software" therefor integrated into installations for "development" or for one or more phases of "production"

"Radiation-hardened" (MTCR context) (Cat. 3, 6) -

The component or equipment is designed or rated to withstand radiation levels which meet or exceed a total irradiation dose of 5×10^5 rads (Si).

"Usable in" or "Capable of" . . .

APPENDIX 4-4 CCL Revisions to Conform with NSG

This Appendix consists of informal suggestions, in line-in ~~line-out~~ form, to indicate how items on the Commerce Control List (CCL) might be revised to conform with multilaterally-agreed Nuclear Suppliers Group (NSG) texts or to remove internal inconsistencies. For the text of NSG "Technology Controls," to which reference is made in these suggestions, see Appendix 4-6.

These revisions are not in effect and may never be.

Explanatory material appears in parentheses. It appears the first time the issue is raised and is generally not repeated for subsequent instances of the same issue.

This Appendix is based on CCL and NSG texts in effect June 15, 2000.

The numbering of NSG items recently changed. As a start towards comparing CCL and NSG texts, the following three tables cross reference among CCL ECCN numbers, old NSG numbers, and new NSG numbers in the order, respectively, of those three number series:

ECCN	*Old NSG*	*New NSG*	*Topic*
1A002	2.8.d	2.A.3	composite structures
1A202	2.8.d	2.A.3	composite structures
1A225	8.5	2.A.2	platinized catalysts
1A226	4.1	4.A.1	packings for heavy water separation
1A227	8.2.2	1.A.1	radiation shielding windows
1B001	3.4	3.B.4	filament winding machines
1B101	3.4	3.B.4	filament winding machines
1B201	3.4	3.B.4	filament winding machines
1B225	3.1	3.B.1	fluorine production
1B226	3.14	3.B.5	electromagnetic isotope separation
1B227	4.5	4.B.3	ammonia synthesis converters
1B228	4.4	4.B.2	hydrogen-cryogenic distillation
1B229	4.3	4.B.1	water-hydrogen ulphide exchange
1B230	4.2	4.A.2	pumps for potassium amide catalyst

ECCN	*Old NSG*	*New NSG*	*Topic*
1B231	8.4	2.B.1	tritium facilities, plants or equipment
1B232	4.6	4.A.3	turboexpanders
1C002	2.1	2.C.1	aluminum alloys
1C002	2.1	2.C.13	titanium alloys
1C010	2.8.a-c	2.C.7	fibrous or filamentary materials
1C116	2.12	2.C.11	maraging steels
1C202.a	2.1	2.C.1	aluminum alloys
1C202.b	2.1	2.C.13	titanium alloys
1C210	2.8.a-c	2.C.7	fibrous or filamentary materials
1C216	2.12	2.C.11	maraging steels
1C225	2.4	2.C.4	boron
1C226	2.15	2.C.14	tungsten
1C227	2.5	2.C.5	calcium
1C228	2.11	2.C.10	magnesium
1C229	2.3	2.C.3	bismuth
1C230	2.2	2.C.2	beryllium
1C231	2.9	2.C.8	hafnium
1C232	8.6	2.C.18	helium
1C233	2.10	2.C.9	lithium
1C234	2.16	2.C.15	zirconium
1C235	8.3	2.C.17	tritium
1C236	8.7	2.C.19	alpha-emitting radionuclides
1C237	2.13	2.C.12	radium-226
1C238	2.6	2.C.6	chlorine trifluoride
1C239	6.4	6.C.1	explosives
1C240	2.17	2.C.16	nickel powder, porous nickel
1D001	3.4	3.D.1	software for filament winding machines
1D101	3.4	3.D.1	software for filament winding machines
1D201	3.4	3.D.1	software for filament winding machines
2A225	2.7	2.A.1	crucibles
2A226	3.9	3.A.3	valves
2B001	1.2	1.B.2	numerically controlled machine tools
2B004	1.5	1.B.5	isostatic presses

ECCN	*Old NSG*	*New NSG*	*Topic*
2B006	1.3	1.B.3	dimensional inspection systems
2B007	1.6	1.A.3	robots
2B009	1.1	1.B.1	flow-forming machines
2B104	1.5	1.B.5	isostatic presses
2B109	1.1	1.B.1	flow-forming machines
2B116	1.7	1.B.6	vibration test equipment
2B201	1.2	1.B.2	machine tools
2B204	1.5	1.B.5	isostatic presses:
2B206	1.3	1.B.3	dimensional inspection systems
2B207	1.6	1.A.3	robots
2B209	1.1	1.B.1	flow-forming machines
2B225	8.2.1	1.A.4	remote manipulators
2B226	1.4	1.B.4	vacuum or controlled environment induction furnaces
2B227	1.8	1.B.7	metallurgical furnaces
2B228	3.2	3.B.2	rotor fabrication, bellow-forming
2B229	3.3	3.B.3	centrifugal machines
2B230	3.8	3.A.7	pressure transducers
2B231	3.11	3.A.8	vacuum pumps
2B232	5.2	5.B.2	light gas guns
2D001	1.1	1.D.1	software for flow-forming machines
2D001	1.3	1.D.1	software for dimensional inspection
2D001	1.5	1.D.1	software for isostatic presses
2D001	1.6	1.D.1	software for robots
2D001	1.2	1.D.2	software for machine tools
2D002.a	1.2	1.D.3	software for 5-axis numerical control
2D101	1.1	1.D.1	software for flow-forming machines
2D101	1.5	1.D.1	software for isostatic presses
2D101	1.7	1.D.1	software for vibration testing
2D201	1.1	1.D.1	software for flow-forming machines

ECCN	*Old NSG*	*New NSG*	*Topic*
2D201	1.3	1.D.1	software for dimensional inspection
2D201	1.5	1.D.1	software for isostatic presses
2D201	1.6	1.D.1	software for robots
2D201	1.7	1.D.1	software for vibration testing
2D201	1.8	1.D.1	software for metallurgical furnaces
2D201	3.3	3.D.1	software for centrifugal machines
2D202	1.2	1.D.2	software for machine tools
3A001.e.2	6.2.2	6.A.4	capacitors
3A001.e.3	3.10	3.A.4	superconducting solenoidal electromagnets
3A201.a	6.2.2	6.A.4	capacitors
3A201.b	3.10	3.A.4	superconducting solenoidal electromagnets
3A201.c	5.1	5.B.1	flash X-ray generators
3A225	3.5	3.A.1	frequency changers
3A226	3.12	3.A.5	direct current high-power supplies
3A227	3.13	3.A.6	high-voltage direct current power supplies
3A228	6.2.1	6.A.3	switching devices
3A229	6.3	6.A.2	firing sets
3A230	7.3	5.B.6	high-speed pulse generators
3A231	8.1	6.A.5	neutron generator systems
3A232	6.1	6.A.1	detonators
3A233	3.7	3.B.6	mass spectrometers
6A003.a.2	5.3	5.B.3	mechanical rotating mirror cameras
6A003.a.3	5.4	1.A.2	electronic streak
6A003.a.4	5.4	1.A.2	framing cameras
6A005	3.6.a,c,f,h	3.A.2	lasers
6A202	7.2	5.A.1	photomultiplier tubes
6A203.a	5.3	5.B.3	mechanical rotating mirror cameras
6A203.b	5.4	1.A.2	electronic streak cameras, framing cameras

ECCN	*Old NSG*	*New NSG*	*Topic*
6A203.c	8.2.3	5.B.4	radiation-hardened TV cameras
6A205	3.6.b,d,e,g,i	3.A.2	lasers
6A225	5.5.a	5.B.5.a	velocity interferometers
6A226.a	5.5.b	5.B.5.b	manganin gauges
6A226.b	5.5.c	5.B.5.c	quartz pressure transducers
6D001	-	-	
1A227	8.2.2	1.A.1	radiation shielding windows
6A003.a.3	5.4	1.A.2	electronic streak cameras
6A003.a.4	5.4	1.A.2	framing cameras
6A203.b	5.4	1.A.2	electronic streak cameras, framing cameras
2B007	1.6	1.A.3	robots
2B207	1.6	1.A.3	robots
2B225	8.2.1	1.A.4	remote manipulators
2B009	1.1	1.B.1	flow-forming machines
2B109	1.1	1.B.1	flow-forming machines
2B209	1.1	1.B.1	flow-forming machines
2B001	1.2	1.B.2	numerically controlled machine tools
2B201	1.2	1.B.2	machine tools
2B006	1.3	1.B.3	dimensional inspection systems
2B206	1.3	1.B.3	dimensional inspection systems
2B226	1.4	1.B.4	induction furnaces
2B004	1.5	1.B.5	isostatic presses
2B104	1.5	1.B.5	isostatic presses
2B204	1.5	1.B.5	isostatic presses:
2B116	1.7	1.B.6	vibration test equipment
2B227	1.8	1.B.7	metallurgical furnaces
2D001	1.1	1.D.1	software for flow-forming machines
2D101	1.1	1.D.1	software for flow-forming machines
2D201	1.1	1.D.1	software for flow-forming machines
2D001	1.3	1.D.1	software for dimensional inspection
2D201	1.3	1.D.1	software for dimensional inspection

ECCN	*Old NSG*	*New NSG*	*Topic*
2D001	1.5	1.D.1	software for isostatic presses
2D101	1.5	1.D.1	software for isostatic presses
2D201	1.5	1.D.1	software for isostatic presses
2D001	1.6	1.D.1	software for robots
2D201	1.6	1.D.1	software for robots
2D101	1.7	1.D.1	software for vibration testing
2D201	1.7	1.D.1	software for vibration testing
2D201	1.8	1.D.1	software for metallurgical furnaces
2D001	1.2	1.D.2	software for machine tools
2D002.a	1.2	1.D.3	software for 5-axis numerical control
2A225	2.7	2.A.1	crucibles
1A225	8.5	2.A.2	platinized catalysts
1A002	2.8.d	2.A.3	composite structures
1A202	2.8.d	2.A.3	composite structures
1B231	8.4	2.B.1	tritium facilities, plants or equipment
1C002	2.1	2.C.1	aluminum alloys
1C202.a	2.1	2.C.1	aluminum alloys
1C230	2.2	2.C.2	beryllium
1C229	2.3	2.C.3	bismuth
1C225	2.4	2.C.4	boron
1C227	2.5	2.C.5	calcium
1C238	2.6	2.C.6	chlorine trifluoride
1C010	2.8.a-c	2.C.7	fibrous or filamentary materials
1C210	2.8.a-c	2.C.7	fibrous or filamentary materials
1C231	2.9	2.C.8	hafnium
1C233	2.10	2.C.9	lithium
1C228	2.11	2.C.10	magnesium
1C116	2.12	2.C.11	maraging steels
1C216	2.12	2.C.11	maraging steels
1C237	2.13	2.C.12	radium-226
1C002	2.1	2.C.13	titanium alloys
1C202.b	2.1	2.C.13	titanium alloys
1C226	2.15	2.C.14	tungsten
1C234	2.16	2.C.15	zirconium
1C240	2.17	2.C.16	nickel powder, porous nickel

ECCN	*Old NSG*	*New NSG*	*Topic*
1C235	8.3	2.C.17	tritium
1C232	8.6	2.C.18	helium
1C236	8.7	2.C.19	alpha-emitting radionuclides
3A225	3.5	3.A.1	frequency changers
6A005	3.6.a,c,f,h	3.A.2	lasers
6A205	3.6.b,d,e,g,i	3.A.2	lasers
2A226	3.9	3.A.3	valves
3A001.e.3	3.10	3.A.4	superconducting solenoidal electromagnets
3A201.b	3.10	3.A.4	superconducting solenoidal electromagnets
3A226	3.12	3.A.5	high-voltage direct current power supplies
3A227	3.13	3.A.6	direct current high-power supplies
2B230	3.8	3.A.7	pressure transducers
2B231	3.11	3.A.8	vacuum pumps
1B225	3.1	3.B.1	fluorine production
2B228	3.2	3.B.2	rotor fabrication, bellow-forming
2B229	3.3	3.B.3	centrifugal machines
1B001	3.4	3.B.4	filament winding machines
1B101	3.4	3.B.4	filament winding machines
1B201	3.4	3.B.4	filament winding machines
1B226	3.14	3.B.5	electromagnetic isotope separation
3A233	3.7	3.B.6	mass spectrometers
1D001	3.4	3.D.1	software for composite production
1D101	3.4	3.D.1	software for composite production
1D201	3.4	3.D.1	software for composite production
2D201	3.3	3.D.1	software for centrifugal machines
1A226	4.1	4.A.1	packings for heavy water separation

ECCN	*Old NSG*	*New NSG*	*Topic*
1B230	4.2	4.A.2	pumps for potassium amide catalyst
1B232	4.6	4.A.3	turboexpanders
1B229	4.3	4.B.1	water-hydrogen ulphide exchange
1B228	4.4	4.B.2	hydrogen-cryogenic distillation
1B227	4.5	4.B.3	ammonia synthesis converters
6A202	7.1	5.A.1	photomultiplier tubes
3A201.c	5.1	5.B.1	flash X-ray generators
2B232	5.2	5.B.2	light gas guns
6A203.a.3	5.3	5.B.3	mechanical rotating mirror cameras
6A003.a.2	5.3	5.B.3	mechanical rotating mirror cameras
6A203.c	8.2.3	5.B.4	radiation-hardened TV cameras
6A225	5.5.a	5.B.5.a	velocity interferometers
6A226.a	5.5.b	5.B.5.b	manganin gauges
6A226.b	5.5.c	5.B.5.c	quartz pressure transducers
3A230	7.3	5.B.6	high-speed pulse generators
3A232	6.1	6.A.1	detonators
3A229	6.3	6.A.2	firing sets
3A228	6.2.1	6.A.3	switching devices
3A001.e.2	6.2.2	6.A.4	capacitors
3A201.a	6.2.2	6.A.4	capacitors
3A231	8.1	6.A.5	neutron generator systems
1C239	6.4	6.C.1	explosives
2B009	1.1	1.B.1	flow-forming machines
2B109	1.1	1.B.1	flow-forming machines
2B209	1.1	1.B.1	flow-forming machines
2D001	1.1	1.D.1	software for flow-forming machines
2D101	1.1	1.D.1	software for flow-forming machines
2D201	1.1	1.D.1	software for flow-forming machines
2B001	1.2	1.B.2	numerically controlled machine tools
2B201	1.2	1.B.2	machine tools

ECCN	*Old NSG*	*New NSG*	*Topic*
2D001	1.2	1.D.2	software for machine tools
2D002.a	1.2	1.D.3	software for 5-axis numerical control
2D201	1.2	1.D.2	software for machine tools
2B006	1.3	1.B.3	dimensional inspection systems
2B206	1.3	1.B.3	dimensional inspection systems
2D001	1.3	1.D.1	software for dimensional inspection
2D201	1.3	1.D.1	software for dimensional inspection
2B226	1.4	1.B.4	induction furnaces
2B004	1.5	1.B.5	isostatic presses
2B104	1.5	1.B.5	isostatic presses
2B204	1.5	1.B.5	isostatic presses
2D001	1.5	1.D.1	software for isostatic presses
2D101	1.5	1.D.1	software for isostatic presses
2D201	1.5	1.D.1	software for isostatic presses
2B007	1.6	1.A.3	robots
2B207	1.6	1.A.3	robots
2D001	1.6	1.D.1	software for robots
2D201	1.6	1.D.1	software for robots
2B116	1.7	1.B.6	vibration test equipment
2D201	1.7	1.D.1	software for vibration testing
2B227	1.8	1.B.7	metallurgical furnaces
2D201	1.8	1.D.1	software for metallurgical furnaces
1C002	2.1	2.C.1	aluminum alloys
1C202.a	2.1	2.C.1	aluminum alloys
1C002	2.1	2.C.13	titanium alloys
1C202.b	2.1	2.C.13	titanium alloys
1C230	2.2	2.C.2	beryllium
1C229	2.3	2.C.3	bismuth
1C225	2.4	2.C.4	boron
1C227	2.5	2.C.5	calcium
1C238	2.6	2.C.6	chlorine trifluoride
2A225	2.7	2.A.1	crucibles
1C010	2.8.a-c	2.C.7	fibrous or filamentary materials
1C210	2.8.a-c	2.C.7	fibrous or filamentary materials

ECCN	*Old NSG*	*New NSG*	*Topic*
1A002	2.8.d	2.A.3	composite structures
1A202	2.8.d	2.A.3	composite structures
1C231	2.9	2.C.8	hafnium
1C233	2.10	2.C.9	lithium
1C228	2.11	2.C.10	magnesium
1C116	2.12	2.C.11	maraging steels
1C216	2.12	2.C.11	maraging steels
1C237	2.13	2.C.12	radium-226
1C226	2.15	2.C.14	tungsten
1C234	2.16	2.C.15	zirconium
1C240	2.17	2.C.16	nickel powder, porous nickel
1B225	3.1	3.B.1	fluorine production
2B228	3.2	3.B.2	rotor fabrication, bellow-forming
2B229	3.3	3.B.3	centrifugal machines
2D201	3.3	3.D.1	software for centrifugal machines
1B001	3.4	3.B.4	filament winding machines
1B101	3.4	3.B.4	filament winding machines
1B201	3.4	3.B.4	filament winding machines
1D001	3.4	3.D.1	software for filament winding machines
1D101	3.4	3.D.1	software for filament winding machines
1D201	3.4	3.D.1	software for filament winding machines
3A225	3.5	3.A.1	frequency changers
6A005	3.6.a,c,f,h	3.A.2	lasers
6A205	3.6.b,d,e,g,i	3.A.2	lasers
3A233	3.7	3.B.6	mass spectrometers
2B230	3.8	3.A.7	pressure transducers
2A226	3.9	3.A.3	valves
3A001.e.3	3.10	3.A.4	superconducting solenoidal electromagnets
3A201.b	3.10	3.A.4	superconducting solenoidal electromagnets
2B231	3.11	3.A.8	vacuum pumps

ECCN	*Old NSG*	*New NSG*	*Topic*
3A226	3.12	3.A.5	direct current high-power supplies
3A227	3.13	3.A.6	high-voltage direct current power supplies
1B226	3.14	3.B.5	electromagnetic isotope separation
1A226	4.1	4.A.1	packings for heavy water separation
1B230	4.2	4.A.2	pumps for potassium amide catalyst
1B229	4.3	4.B.1	water-hydrogen ulphide exchange
1B228	4.4	4.B.2	hydrogen-cryogenic distillation
1B227	4.5	4.B.3	ammonia synthesis converters
1B232	4.6	4.A.3	turboexpanders
3A201.c	5.1	5.B.1	flash X-ray generators
2B232	5.2	5.B.2	light gas guns
6A003.a.2	5.3	5.B.3	mechanical rotating mirror cameras
6A203.a	5.3	5.B.3	mechanical rotating mirror cameras
6A003.a.3	5.4	1.A.2	electronic streak cameras
6A003.a.4	5.4	1.A.2	framing cameras
6A203.b	5.4	1.A.2	electronic streak cameras, framing cameras
6A225	5.5.a	5.B.5.a	velocity interferometers
6A226.a	5.5.b	5.B.5.b	manganin gauges
6A226.b	5.5.c	5.B.5.c	quartz pressure transducers
3A232	6.1	6.A.1	detonators
3A228	6.2.1	6.A.3	switching devices
3A001.e.2	6.2.2	6.A.4	capacitors
3A201.a	6.2.2	6.A.4	capacitors
3A229	6.3	6.A.2	firing sets
1C239	6.4	6.C.1	explosives
6A202	7.1	5.A.1	photomultiplier tubes
3A230	7.3	5.B.6	high-speed pulse generators
3A231	8.1	6.A.5	neutron generator systems
2B225	8.2.1	1.A.4	remote manipulators

ECCN	*Old NSG*	*New NSG*	*Topic*
1A227	8.2.2	1.A.1	radiation shielding windows
6A203.c	8.2.3	5.B.4	radiation-hardened TV cameras
1C235	8.3	2.C.17	tritium
1B231	8.4	2.B.1	tritium facilities, plants or equipment
1A225	8.5	2.A.2	platinized catalysts
1C232	8.6	2.C.18	helium
1C236	8.7	2.C.19	alpha-emitting radionuclides

0B008

Items described in 0B008 are subject to the export licensing authority of the Nuclear Regulatory Commission (see 10 CFR part 110)

(For consistency with 10 CFR 110.8(a))

0D001

. . . controlled by ~~this Category~~ 0B003

0E001

. . . controlled by ~~this Category~~ 0B003

1A002

NP applies to ~~1A002.b.1 in the form of tubes with an inside diameter between 75 mm and 400 mm~~ composite structures also described in 1A202

(NSG 2.C.7.a specific modulus and specific tensile strength limits are higher than those in 1A002.b.1)

1A202

. . . ~~specified in~~ controlled by 1C210.a or with carbon prepreg materials controlled by 1C210.c

(For internal consistency)

1A226

. . . and made of phosphor bronze mesh ~~(~~chemically treated to improve wettability~~)~~ and designed ~~for use~~ to be used in vacuum distillation towers.

1A227

. . . radiation shielding windows having a 'cold area' greater than 0.09 m^2 ~~on cold area and with~~, a density . . .
Technical Note: The term 'cold area' means the viewing area of the window exposed to the lowest level of radiation in the design application.

1B001

NP applies. . . ~~and coordinating and programming controls and precision mandrels for these filament winding machines~~

(1B001 covers neither coordinating and programming controls nor precision mandrels)

1B101

NP applies to portion of 1B101.a ~~only~~ also described in 1B201

(NSG 3.B.4 is limited to machines " having motions for positioning, wrapping and winding fibers coordinated and programmed," rather than "of which the motions . . . can be coordinated and programmed" (underlining added))

1B201

. . . "fibrous ~~and~~ or filamentary materials"

(The term which is defined is "fibrous or filamentary materials")

1B225

. . . with ~~a production~~ an output capacity

(Production capacity might be limited by factors other than output capacity)

1B226

Related Controls: (1) This entry includes separators capable of enriching stable isotopes as well as those for uranium (a separator capable of separating the isotopes of lead with a one-mass unit difference is inherently capable of enriching the isotopes of uranium with a three-unit mass difference). (2) ~~and~~ This entry includes separators with the ion sources and ~~collections~~ collectors both in the magnetic field and those configurations in which they are external to the field.

1B228

Related Controls: ~~Heavy water production equipment is also~~ Plants for the production, separation, or purification of heavy water, deuterium, and deuterium compounds and specially designed or prepared assemblies and components for these plants are subject to the export licensing authority of the Nuclear Regulatory Commission . . .
Related Definitions: ~~"Fine-grain stainless steels" in this entry are defined to be fine-grain austenitic stainless steels with an ASTM (or equivalent standard) grain size number of 5 or greater.~~ N/A
. . .
c. Constructed of either:
   1. ~~"fine-grain s~~ Stainless steels~~"~~ of the 300 series with low sulfur content and with an austenitic ASTM (or equivalent standard) grain size number of 5 or greater; or
   2. e Equivalent materials which are both cryogenic and H_2-compatible ~~materials~~; and

1B229

Water-hydrogen sulfide exchange tray columns having all the following characteristics: constructed ~~from~~ of ~~fine~~ carbon steel having an austenitic ASTM (or equivalent standard) grain size number of 5 or greater, with a diameter of 1.8 m or greater, ~~which~~ and can operate at ~~a nominal~~ pressures of 2 Mpa or greater, and internal contactors therefor.
Related Controls: (1) See 0B004 . . .. These items are controlled on the NSG Trigger List (INFCIRC/254/part 1. (2) See 10 CFR part 110 . . .
Related Definition: ~~(1) This entry includes i~~Internal contactors of the columns are . . .and are constructed of ~~materials resistant to corros-~~

~~ion by hydrogen sulfide/water mixtures~~ stainless steels with a carbon content of 0.03% or less. . . . ~~(2) Fine carbon steel in this entry is defined to be steel with the austenitic ASTM (or equivalent standard) grain size number of 5 or greater. (3) Materials resistant to corrosion by hydrogen sulfide/water mixtures in this entry are defined to be stainless steels with a carbon content of 0.03% or less.~~

1B230

Pumps capable of circulating solutions of . . .
Related Controls: ~~Heavy water production equipment is also~~ Plants for the production, separation, or purification of heavy, water, deuterium, and deuterium compounds and specially designed or prepared assemblies and components for these plants are subject to the export licensing authority of the Nuclear Regulatory Commission . . .

1B231

Tritium facilities or~~,~~ plants ~~or~~ and equipment therefor, as follows . . .
Related Controls (revise and move to 1C235)
. . .
b.2. Hydrogen isotope storage ~~and~~ or purification systems using metal hydrides as the storage~~,~~ or purification medium.

1C010

NP applies . . . "fibrous ~~and~~ or filamentary materials" . . . "fibrous ~~and~~ or filamentary materials" . . .

1C202

Related Definition: The phrase "alloys capable of" encompasses aluminum alloys before ~~and~~ or after heat treatment.

1C210

"Fibrous ~~and~~ or filamentary materials" . . .
Related Controls: See 1C010.e and 9A110 for fiber prepregs

a. Carbon and aramid "fibrous ~~and~~ or filamentary materials" . . . a "specific tensile strength" of ~~23/5~~ 23.5×10^3 m or greater except ~~Aramid~~ aramid . . .
b. Glass "fibrous ~~and~~ or filamentary materials" . . . ~~described in~~ controlled by . . .

1C216

. . . ~~ultimat~~ ultimate . . .

1C225

Boron enriched in the boron-10 (^{10}B) isotope to greater than its natural isotopic abundance, as follows: elemental boron, ~~and boron~~ compounds, mixtures containing boron, manufactures thereof, waste or scrap of any of the foregoing ~~and loaded materials in which the boron-10 isotope is more than 20% by weight of the total boron content.~~
Related Definitions: ~~N/A~~ (1) In this entry, mixtures containing boron include boron loaded materials. (2) The natural isotopic abundance of boron-10 is approximately 18.5 weight percent (20 atom percent).

1C226

~~Parts made of t~~Tungsten, tungsten carbide, ~~or~~ and ~~tungsten~~ alloys ~~(greater~~ containing more than 90% tungsten~~)~~ by weight having a mass greater than 20 kg and in forms with a hollow cylindrical symmetry (including cylinder segments) with an inside diameter greater than 100 mm but less than 300 mm, except ~~parts~~ manufactures specially designed for use as weights or gamma-ray collimators.

1C227

Calcium ~~(high purity)~~ containing both . . . and less than 10 parts per million by weight of boron.

1C228

Magnesium ~~(high purity)~~ containing both . . . and less than 10 parts per million by weight of boron.

1C229

~~High purity (99.99% or greater) b~~Bismuth having a purity of 99.99% or greater by weight and ~~with very low silver content (~~ containing less than 10 parts per million~~)~~ by weight of silver.

1C230

Beryllium metal, alloys containing more than 50% of beryllium by weight, beryllium compounds, ~~or~~ manufactures thereof, ~~including~~ and waste ~~and~~ or scrap ~~containing beryllium metal, alloys, or compounds~~ of any of the foregoing.
Related Controls: ~~(1) This entry includes waste and scrap containing beryllium metal, alloys, or componds. (2)~~ This entry does not control (a) . . . (b) . . . ~~fabricted~~ fabricated . . .

1C231

Hafnium metal, alloys and compounds containing ~~mroe~~ more than 60% hafnium by weight ~~and~~, manufactures thereof, and waste or scrap of any of the foregoing.

1C232

Helium-3 (^{3}He) ~~or helium isotopically enriched in the helium-3 isotope~~, mixtures containing helium-3, and products or devices containing any of the foregoing, except~~;~~ a product or device containing less than 1g of helium-3.

1C233

Lithium enriched in the ~~6 isotope~~ Lithium-6 (^{6}Li) isotope to greater than ~~7.5 atom percent,~~ its natural isotopic abundance ~~alloys, compounds or mixtures containing lithium enriched in the 6 isotope, or~~ and products or devices containing ~~any of the foregoing~~ enriched lithium, as follows: elemental lithium, alloys, compounds, mixtures containing lithium, manufactures thereof, waste or scrap of any of the foregoing.
Note: This entry does not control ~~except~~ thermoluminescent dosimeters.
Technical Note: The natural isotopic abundance of lithium-6 is approximately 6.5 weight percent (7.5 atom percent).

1C234

Zirconium with a hafnium content of less than 1 part hafnium to 500 parts zirconium by weight, ~~in the form of~~ as follows: metal, alloys containing ~~mroe~~ more than 50% zirconium by weight, ~~or~~ compounds, ~~or~~ manufactures ~~wholly~~ thereof~~;~~,, waste or scrap of any of the foregoing.

Note: This entry does not control ~~except~~ zirconium in the form of foil having a thickness not exceeding 0.10 mm.

Related Controls: . . . ~~This entry includes waste and scrap containing zirconium. This entry does not control zirconium in the form of foil or strip having a thickness not exceeding 0.10 mm (0.004 in.).~~

1C235

Tritium, tritium compounds, mixtures containing tritium in which the ratio of tritium to hydrogen ~~by~~ atoms exceeds 1 part in 1000, ~~or~~ and products or devices containing any of the foregoing~~;~~ except,

Note: This entry does not control a product or device containing not more than 1.48×10^3 GBq (40 Ci) of tritium ~~in any form~~.

Reason for Control: Items described in 1C235 except for products or devices are subject to the export licensing authority of the Nuclear Regulatory Commission. (see 10 CFR part 110)

1C236

Alpha-emitting radionuclides having an alpha half-life of 10 days or greater~~,~~ but less than 200 years, in the following forms:

a. Elemental;s
b. ~~c~~Compounds ~~and mixtures containing any of these radionuclides with~~ having a total alpha activity of 37 Gbq/kg ~~(1 Ci/kg)~~ or greater,
c. Mixtures having a total alpha activity of 37 Gbq/kg or greater, or
d. ~~p~~Products or devices containing any of the foregoing, except a product or device containing less than 3.7 Gbq ~~(100 millicuries)~~ of alpha activity.

1C237

Radium-226 (^{226}Ra), radium-226 alloys, radium-226 compounds, mixtures containing radium-226, manufactures thereof, and products

or devices containing any of the foregoing, except medical applicators, or products or devices containing not more than 0.37 Gbq ~~(10 millicuries)~~ of radium-226. ~~in any form~~

1C239

High explosives~~, other than those controlled by the U.S. Munitions List, or~~ substances or mixtures containing more than 2% ~~thereof,~~ by weight of any of the following (see List of Items Controlled):
Related Controls: Sub-items a., b., c., and d. are subject to the export licensing authority of the U.S. Department of State, Office of Defense Trade Controls. See ~~also~~ 22 CFR part ~~12~~ 121
Items: ~~The list of items controlled is contained in the ECCN heading.~~

a. Cyclotetramethylenetetranitramine (HMX) (CAS 2691-41-0);
b. Cyclotrimethylenetrinitramine (RDX) (CAS 121-82-4);
c. Triaminotrinitrobenzene (TATB) (CAS 3058-38-6);
d. Hexanitrostilbene (HNS) (CAS 20062-22-0); or
e. Any explosive with a crystal density greater than 1.8 gm/cm^3 and having a detonation velocity greater than 8,000 m/s.

1D001

NP applies to "software" specially designed for the ~~"development", "production" or~~ "use" of items controlled by 1B001 for NP reasons.
TSR: Yes, ecept N/A for MT or NP.
(NSG 3.D.1 does not control "modified" software and does not control "development" or "production" software; TSR is limited to items controlled for NS reasons only)

1D002

NP applies to the portion of 1D002 for the "use" of 1B001, 1B101, or 1B201 for NP reasons.

1D101

NP applies to "software" specially designed for the "use" of items controlled by 1B101 for NP reasons.

1D201

"Software", other than that specified in 1D001, 1D002 or 1D101, specially designed ~~or modified~~ for the "use" of items controlled by 1B201.

1E001

NP applies to NSG "Technology Controls" for items controlled by 1A002, 1B001, 1B101, 1B201, 1B225 to ~~1B232~~ 1B233, ~~1C001,~~ 1C010, 1C116, 1C202, 1C210, 1C216, 1C225 to ~~1C234, 1C236 to 1C238~~ 1C240 for NP reasons.
TSR: Yes, except for MT or NP.

(NSG "Technology Controls" differ from Wassenaar General Technology Note; 1C001 is not a nuclear item; a portion of 1C116 is covered by NSG 2.C.11; A portion of 1C235 is subject to Commerce jurisdiction; 1C239 and 1C240 are NP items; TSR is limited to items controlled for NS reasons only)

1E101

"Technology . . . for . . . 1A002, . . .
NP applies to "technology" for the "use" of items controlled by 1A002, 1B001.a, ~~and~~ 1B101, or 1C116 for NP reasons

(portions of 1A002 are covered by both MTCR and NSG; only portions of 1B001.a and 1B101 are covered by NSG 3.B.4; a portion of 1C116 is covered by NSG 2.C.11).

1E102

NP applies to "technology" for the "development" of "software" controlled by 1D001 or 1D101 for NP reasons.

1E201

"'Technology" according to ~~the General Technology Note~~ NSG "Technology Controls" other than that controlled by 1E001, 1E101, or 1E102, for the "development", "production", or "use" of items controlled by 1A002, 1A202, 1A225 to 1A227, 1B001.a, 1B101, 1B201, 1B225 to 1B233, 1C002.a.2.c or a.2.d, 1C010~~.b,~~ 1C116, 1C202, 1C210, 1C216, 1C225 to 1C240, 1D001, 1D002, 1D101 or 1D201 for NP reasons.

(Since NSG "Technology Controls" are broader than the Wassenaar General Technology Note 1E001 does not cover all "development" and "production" technology; NSG covers parts of 1B001a, 1C116, 1D001, 1D002, and 1D101 and parts of 1C010 other than 1C010.b)

~~1E202~~

~~"Technology" according to the General Technology Note for the "development" or "production" of goods controlled by 1A202 or 1A225 to 1A227.~~

(Revised 1E201 would make 1E202 redundant).

~~1E203~~

~~"Technology" according to the General Technology Note for the "development" of "software" controlled by 1D201~~

(Revised 1E201 would make 1E203 redundant)

2A225

a. Crucibles . . . greater by weight
b. Crucibles . . . greater by weight

2A226

Valves . . . nickel by weight ~~either manually or automatically operated~~
Related Controls: Valves specially designed or prepared for gaseous diffusion separation process are ~~also~~ subject to the export licensing authority of the Nuclear Regulatory Commission. (See 10 CFR 110.)

2B001

NP applies ~~2B001.a,b,c, and d, except (1) turning machines under 2B001.a with a capacity equal to or less than 35 mm diameter; (2) bar machines (Swissturn) limited to machnining only bar feed through, if maximum bar diameter is equal to or less than 42 mm and there is no capability of mounting chucks. (Machines may have drilling and/or milling capabilities for machining parts with diameters less than 42 mm); or (3) milling machines under 2B001.b. with x-axis travel greater than two meters and overall "positioning~~

~~accuracy" on the x-axis more (worse) than 0.30 mm~~ to 2B001.d and to portions of 2B001.a,b,c also described in 2B201.

(Existing "NP applies" paragraph does not take into consideration that Wassenaar uses a 1997 standard whereas NSG uses a 1988 standard.)

2B004

NP applies to ~~entire entry except 2B004.b.3 and presses with temperatures exceeding 1,733 K, and pressure below 69 MPa~~ portion of 2B004 also described in 2B204.

(2B004, unlike NSG 1.B.5, controls accessories)

2B006

NP applies to 2B006.b.1.a, b.1.c, and b.2 and portions of 2B006.a and .b.1.b also described in 2B206

(NSG 1.B.3.a and 2B006.a use different parameters; 2B006.b.1.b uses the word "voltage"; whereas NSG 1.B.3.b.2 uses the word "variable")

2B007

NP applies to ~~2B007.c if specially designed or rated as radiation hardened to withstand greater than 5×10^4 grays (Si) without operational degraqdation; to 2B007.b; and to specially designed controllers and "end-effectors" therefor~~ portions of 2B007.a,b,c also described in 2B207.

(NSG 1.A.3 covers only end-effectors having specified characteristics)

2B009

NP applies to ~~flow-forming machines; and spin-forming machines capable of flow-forming function~~ portion of 2B009 also described in 2B209.

(NSG 1.B.1 is limited to machines having three or more rollers)

2B104

NP applies to portion of 2B104 described in 2B204.

2B109

NP applies to ~~entire entry~~ portion of 2B109.a also described in 2B209.

(NSG 1.B.1, unlike MTCR 3 Note 1, is limited to machines having three or more rollers)

2B116

a. . . . ~~controler~~ controller

2B201

Machine tools . . . can be equipped with electronic devices . . .
Unit: ~~Equipment in n~~Number~~; parts and accessories in $ value~~
Related Definition: ~~N/A~~ "Positioning accuracy" of "numerically controlled" machine tools is to be determined and presented in accordance with this entry in conjunction with the requirements below:

(a) Test conditions (ISO 230/2 (1988), paragraph 3):

(1) For 12 hours before and during measurements, the machine tool and accuracy measuring equipment will be kept at the same ambient temperature. During the premeasurement time, the slides of the machine will be continuously cycled identically to the way they will be cycled during the accuracy measurements;

(2) The machine shall be equipped with any mechanical, electronic, or software compensation to be exported with the machine;

(3) Accuracy of measuring equipment for the measurements shall be at least four times more accurate than the expected machine tool accuracy;

(4) Power supply for slide drives shall be as follows:

(i) Line voltage variation shall not be greater than + or - 10% of nominal rated voltage;

(ii) Frequency variation shall not be greater than + or −2 Hz of normal frequency;

(iii) Lineouts or interrupted service are not permitted.

(b) Test Program (paragraph 4):

(1) Feed rate (velocity of slides) during measurement shall be the rapid traverse rate;

N.B.: In the case of machine tools which generate optical quality surfaces, the feed rate shall be equal to or less than 50 mm per minute;

(2) Measurements shall be made in an incremental manner from one limit of the axis travel to the other without returning to the starting position for each move to the target position;

(3) Axes not being measured shall be retained at mid-travel during test of an axis.

(c) Presentation of the test results (paragraph 2):

(1) "Positioning accuracy" (A) and

(2) The mean reversal error (B).

Note: Stated "positioning accuracy" levels derived under the following procedures from measurements made according to ISO 230/2 (1988) or national equivalents may be used for each machine tool model if provided to, and accepted by, national authorities instead of individual machine tests.

Stated "positioning accuracy" are to be derived as follows:

1. Select five machines of a model to be evaluated;
2. Measure the linear axis accuracies according to ISO 230/2 (1988);
3. Determine the accuracy values (A) for each axis of each machine. The method of calculating the accuracy value is described in the ISO 230/2 (1988) standard;
4. Determine the average accuracy value of each axis. This average value becomes the stated "positioning accuracy" of each axis for the model (A_x, A_y, . . .);
5. Since 2B201 refers to each linear axis, there will be as many stated "positioning accuracy" values as there are linear axes;
6. If any axis of a machine tool not controlled by this entry has a stated "position accuracy" of 0.006 mm or better (less) for grinding machines, and 0.008 mm or better (less) for milling and turning machines, both according to ISO 230/2 (1988), then the builder should

be required to reaffirm the accuracy level once every eighteen months.

a.1. ... 0.006 mm according to ISO 230/2 (1988) along any linear axis (overall positioning); or
Note: ... does not control milling machines having both of the following characteristics...
a. ...; and
b. ... 0.030 mm according to ISO 230/2 (1988).

b.1. ... 0.004 mm according to ISO 230/2 (1988) along any linear axis (overall positioning); or
Note:
a.3. ... can be
coordinated
simultaneously.

c. Machines tools for turning ... 0.006 mm according to ISO 230/2 (1988)
Note: 2B201.c does not control ~~B~~bar machines (Swissturn), limited to matching only bar feed thru, ~~are excluded~~ if ...
Technical Notes:

1. Axis nomenclature shall be in accordance with International Standard ISO 841, "Numerical Control Machines — Axis and Motion Nomenclature".
2. Not counted in the total number of contouring rotary axes are secondary parallel contouring rotary axes the center line of which is parallel to the primary rotary axis.
3. Rotary axes do not necessarily have to rotate over 360 degrees. A rotary axis can be driven by a linear device, e.g., a screw or a rack-and-pinion.

2B204

"Isostatic presses" ... and ~~specially designed~~ dies ~~and~~, molds, and controls specially designed therefor
("specially designed" modifies "controls" in NSG 1.B.5 text).

2B206

Dimensional inspection machines, ~~devices~~ instruments or systems . . .

Unit: ~~Equipment in n~~Number~~; parts and accessories in $ value~~

Related Definitions: (1) . . . criteria specified for ~~the machine function~~ or the measuring machine function. (2) A machine ~~controlled by~~ described in . . .(3) . . . shall be as described . . . (4) All parameters of measurement values in this entry represent plus/minus, i.e., not total band.

a.2. . . . with a probe of an "accuracy" . . .

b. Systems for ~~simultaneously~~ simultaneous linear-angular inspection . . ..

b.1. . . . equal to or less . . .

c. Linear variable differential transformer (LVDT) systems having both of the following characteristics:

1. "Linearity" equal to or better (less) than 0.1% within a measuring range up to 5 mm; and
2. Drift equal to or better (less) than 0.1% per day at a standard ambient test room temperature + 1 K

2B207

"Robots" . . . (for example, meeting electrical code ratings for high explosives) or specially designed or rated as radiation hardened to withstand a total radiation does greater than 5×10^4 Gy (silicon) without operational degradation and specially designed controllers therefor.

2B209

Unit: ~~Equipment~~ Machines and mandrels in number~~; parts and accessories in $ value~~

a. Machines having ~~any~~ both of the ~~followg~~ following: . . .

2B225

Remote manipulators . . . in radiochemical separation operations ~~and~~ or hot cells . . .

Related Definition: . . . "master/slave" . . .
a. . . . hot cell wall (through-the-wall operation); or

2B226

~~Vacuum and c~~Controlled environment (vacuum or inert gas) induction~~)~~ furnaces . . .

2B227

Vacuum ~~and~~ or other controlled atmosphere metallurgical melting and casting furnaces, as follows (see List of Items Controlled), and specially configured computer control and monitoring systems therefor
b. . . . and plasma atomization and melting furnaces . . .

2B228

Rotor fabrication ~~and~~ or assembly equipment, rotor straightening equipment,

a. Rotor assembly equipment for assembly of gas centrifuge rotor tube sections, baffles, and end caps;
b. . . .
c. . . . high strength "fibrous or filamentary materials"
. . .

2B229

Centrifugal ~~muliplane~~ multiplane balancing machines

a.2. Mass capability ~~for~~ of from 0.9 to 23 kg;
b.2. Mass capability of from 0.9 to 23 kg;

2B231

Vacuum pumps . . . ~~15,000 liters/s~~ 15 m^3/s . . . ~~10^{-4} Torr (1.3310^{-4} mbar)~~ 13.3 mPa.

2D001

NP applies . . . and to specially designed "software" for the "use" of equipment controlled by 2B004, 2B006, 2B007, or 2B009 for NP reasons.
TSR: Yes, except N/A for MT or NP
Related Controls: (1) See also 2D201. (2) . . .
(NSG 1.D.1 is limited to "use" software; TSR is limited to items controlled for NS only)

2D002

NP applies to ~~entire entry, except 2D002.b~~ the following portion of 2D002.a: "software" for any combination of devices or system enabling such device(s) to function as a "numerical control" unit capable of controlling 5 or more interpolating axes that can be coordinated simultaneously for "contouring control"
Note 1: "Software" is controlled whether exported separately or residing in a "numerical control" unit or any electronic device or system.
Note 2: NP does not apply to "software" specially designed or modified by the manufacturers of the control unit or machine tool to operate a machine tool not controlled by 2B201.
TSR: Yes, except N/A for NP

2D101

NP applies to portion of 2D101 specially designed for the NP portions of 2B104, 2B109 or 2B116.

2E001

NP applies to "technology" for items controlled by 2A225, 2A226, . . . 2B116, . . . 2B227, . . . 2B230, . . . 2B232, . . . 2D101 or 2D201 for NP reasons.
TSR: Yes, except N/A for MT or NP or CB

2E002

NP applies to "technology" for equipment controlled by 2A225, 2A226, . . .2B116, . . . 2B227, . . . 2B230, . . . 2B232 for NP reasons
TSR: Yes, except N/A for MT or NP or CB.

2E101

NP applies to "technology" for items controlled by 2B004, 2B009. 2B104, 2B109, and 2B116 for NP reasons.

2E201

"Technology" according to ~~the General Technology Note~~ NSG "Technology Controls" other than that controlled by 2E001, 2E002, or 2E101 for the "development", "production", or "use" of equipment or "software" controlled by . . . 2B004, . . . 2B007~~.b, 2B007.c~~, ~~2B008,~~ . . . 2B104, 2B109, 2B116, . . . 2B206, . . . 2D001, 2D002, 2D101 2D201 or 2D202 for NP reasons.

3A001

NP applies to portion of 3A001.e.2 also described in 3A201.a and portion of 3A001.e.3 also described in 3A201.b.

3A201

Related Controls: ~~This entry does not control magnets that are specially designed for and exported as parts orf medical nuclear magnetic resonance (NMR) imagin systems. Such parts may be exported in separate shipments from different sources, provided that the related export control documents clearly specify that the parts are for medical NMR imaging systems that are being exported.~~ N/A

(The same text appears as a Note to 3A201.b, where it more logically belongs since a decontrol provision is not literally a related control.)

a. Pulse discharge c~~C~~apacitors . . .

b. . . .

Note: 3A201.b does not ~~specify~~ control magnets . . .

c. Flash X-ray generators or pulsed electron accelerators ~~with peak energy of 500 keV or greater,~~ as follows,

(500 keV limit correctly appears in c.1)

3A226

~~Direct current high-power~~ ~~supplies~~ High-power direct current power supplies . . . with a current or voltage ~~regulation~~ stability better than 0.1% over a time period of 8 hours.

3A227

High-voltage direct current power supplies ... with a current or voltage ~~regulation~~ stability better than 0.1% over a time period of 8 hours.

3A229

Firing sets and equivalent high-current pulse generators ~~(for detonators controlled by 3A232)~~ as follows ...

(NSG 6.A.2.b is not limited to firing sets for detonators controlled by 3A232)

b.7 ... ~~for use~~ to operate ...

3A233

Mass spectrometers ... 2 parts in 230, as follows (see List of Items Controlled), and ion sources therefor.

d. ... ~~resistent~~ resistant ...

3E001

NP applies to "technology" for equipment controlled by 3A001, 3A201, 3A225 to 3A233 for NP reasons.

3E201

"Technology" according to ~~the General Technology Note~~ NSG "Technology Controls" other than that controlled by 3E001 for the "development", "production", or "use" of equipment controlled by 3A001, 3A201, 3A225 to 3A233 for NP reasons.

6A003

NP applies to ~~items controlled in paragraphs 6A003.a.2,a.3 and a.4~~ portion of 6A003 also described in 6A203.

(NSG 5.B.3, unlike 6A003.a.2, a.3, and a.4 includes a "rotating mirror" parameter)

6A005

Unit: Equipment in number~~; parts and accessories in $ value~~
NP applies to 6A005:

a.1.c if pulsed, repetition rate greater than 250 Hz, and wavelength between 240 nm and 360 nm~~,~~;

a.2.a ~~(with an~~ if average output power >40 W and operating at wavelengths between 500 nm and 600 nm~~),~~;

a.4.~~c~~ if repetition rate greater than 250 Hz, pulse of less than 200 ns, and wavelength between 9,000 nm and 11,000 nm,;

a.6 ~~(~~if argon ~~"lasers" only~~ and wavelength between 400 nm and 515 nm~~),~~;

c.1.b ~~(with an~~ if alexandrite, bandwidth of 0.005 nm or less, repetition rate greater than 125 Hz, average output power >30 W, and wavelength between 720 nm and 800 nm~~),~~;

c.2.b.2.a if average output power >40 W

~~c.2.c.2.a (with an output power >40 W);~~

~~c.2.c.2.b (with an output power >40 W);~~

c.2.b.2.b ~~(with an~~ if average output power > ~~40W~~ 50 W~~)~~, ~~and~~

d.2.c if tunable dye oscillator with wavelength between 300 nm and 800 nm; and

para-hydrogen Raman shifters designed to operate at 16,000 nm output wavelength and at a repetition rate greater than 250 Hz with a pumping source "laser" controlled by 6A005

(to conform with the portions of NSG 3.A.2 covered by 6A005)

6A203

Unit: Equipment and components in number ~~; parts and accessories in $ value~~

(NSG 1.A.2, 5.B.3, and 5.B.4 do not control parts or accessories)

b.3.b. ~~Gated~~ Gate silicon intensifier target . . .

b.3.c Kerr or ~~pockel~~ Pockels cell electro-optical shuttering; or

c. . . . radiation-
hardened to

withstand greater than ~~5 × 10^3 grays (Silicon) (5 × 10^6 rad (Silicon))~~ 5 × 10^4 Gy (silicon) without operational degradation.

6A205

Unit: Equipment in number~~; parts and accessories in $ value~~

~~b. Tunable pulsed single-mode dye oscillators capable of an average power output of greater than 1 W, a repetition rate greater than 1 kHz, a pulse less than 100 ns, and a wavelength between 300 nm and 800 nm.~~

(Existing 6A205.b is completely covered by 6A005.d.2.c)

b. Neodymium-doped (other than glass) lasers with an output wavelength between 1000 and 1100 nm incorporating frequency doubling to give an output wavelength between 500 and 550 nm with an average output power of greater than 40 W.

(New 6A205.b would cover NSG 3.A.2.c.2)

c. . . ., ~~except single-mode oscillators~~

(The exception is misleading, because single-mode oscillators with these specifications are covered by existing 6A205.b and by 6A005.d.2.c)

d. Pulsed carbon dioxide "lasers" with a repetition rate greater than 250 Hz, an average power output of greater than 500W, and a pulse width of less than 200 ns operating at wavelengths between 9,000 nm and 11,000 nm.

Note: 6A205.d does not control the higher power (typically 1 to 5kW) industrial CO_2 lasers used in applications such as cutting and welding, as these latter lasers are either continuous wave or are pulsed with a pulse width greater than 200 ns.

Recapitulation:	NSG 3.A.2	6A005	6A205
	a. Copper	a.2.a all	—
	b. Argon	a.6 part	a. all
	c.1.a single-mode	c.2.b.2.a.2 all	—
	c.1.b multiple-mode	c.2.b.2.b.2 part	f. all
	c.2 doubling	—	new b.
	d. dye single-mode	d.2.c all	old b all
	e. dye other	—	c. all
	f. Alexandrite	c.1.b.2 all	—
	g. carbon dioxide	a.4 part	d. all
	h. pulsed excimer	a.1.c.2 all	—
	i. Raman	Related Definition (3)	e. all

6A225

Velocity interferometers . . . VISARs (velocity interferometer systems for any reflector) and DLIs (doppler laser interferometers)
Unit: Equipment in number; ~~parts and accessories in $ value~~

6A226

Unit: ~~Equipment in n~~ Number; ~~parts and accessories in $ value~~

6D001

~~NP applies to "software" for equipment controlled by 6A005 for NP reasons~~

(NSG 3.D.1 does not control software for 3.A.2)

6E001

NP applies . . . ~~NP Column 2~~ NP Column 1

6E201

"Technology" according to ~~the General Technology Note~~ NSG "Technology Controls" other than that controlled by 6E001 or 6E002 for the "development", "production", or "use" of equipment controlled by ~~6A003.a.2, 6A003.a.3, 6A003.a.4, 6A005.a.1.c, 6A005.a.2.a, 6A005.c.1.b, 6A005.c.2.c.2, 6A005.c.2.d.2.b,~~ 6A003, 6A005, 6A202, 6A203, 6A205, 6A225 or 6A226 for NP reasons.

Related Definitions: ~~This entry only controls "technology" for items in 6A005.a.2.a with an output power >40W, 6A005.a.6 argon "lasers" only, 6A005.c.1.b with an output power >30W, 6A005.c.2.c.2.a with an output power >40W, 6A005.c.2.c.2.b with an output power >40W, and 6A005.c.2.d.2.b with an output power >40W.~~ N/A

APPENDIX 4-5 CCL Revisions to Conform with Australia Group

This Appendix consists of informal suggestions, in line-in ~~line-out~~ form, to indicate how items on the Commerce Control List (CCL) might be revised to conform with multilaterally-agreed Australia Group (AG) texts or to remove internal inconsistencies. For the text of AG "Related Technology," to which reference is made in these suggestions, see Appendix 4-6.

These revisions are not in effect and may never be.

Explanatory material appears in parentheses. It appears the first time the issue is raised and is generally not repeated for subsequent instances of the same issue.
This Appendix is based on CCL texts in effect June 15, 2000.
ECCN 1D390 is not included in this Appendix, since the "9" in the ECCN indicates intentional unilateral U.S. control.
This Appendix also identifies U.S. Munitions List (USML) controls related to Australia Group controls. Some of the USML controls appear to overlap Commerce Control List ECCNs.

1C350

Related Controls: (1) See also 1C995. (2) Chemical agents, including but not limited to lung irritants, vesicants, lachrymators, tear gases (except tear gas formulations containing 1 % or less CN or CS), sternutators and irritant smoke, and nerve gases and incapacitating agents are subject to the export licensing authority of the U.S. Department of State, Office of Defense Trade Controls (see 22 CFR part 121 Category XIV(a) and part 121.7). For CCL coverage of the tear gas exception, see ECCN 1A984.
a.22 ~~Ethylphosphonus~~ Ethylphosphonous . . .
a.28 . . . (Methylphosphinyl ~~dicloride~~ dichloride);

1C351

Related Controls: (1) Biological agents are subject to the export licensing authority of the U.S. Department of State, Office of Defense Trade Controls (see 22 CFR part 121 Category XIV(b)).

(2) All vaccines and "immunotoxins" are excluded from the scope of this entry. See also ECCN 1C991.
Related Definitions: . . .
(AG omits the CCL definitions)

1C352

Related Controls: (1) Biological agents are subject to the export licensing authority of the U.S. Department of State, Office of Defense Trade Controls (see 22 CFR part 121 Category XIV(b)). (2) All vaccines are excluded from the scope of this entry. (3) See also ECCN 1C991.

1C353

Related Controls: (1) Biological agents are subject to the export licensing authority of the U.S. Department of State, Office of Defense Trade Controls (see 22 CFR part 121 Category XIV(b)). (2) All ~~vacines~~ vaccines are excluded from the scope of this entry. (3) See also ECCN 1C991.

1C354

Related Controls: Biological agents are subject to the export licensing authority of the U.S. Department of State, Office of Defense Trade Controls (see 22 CFR part 121 Category XIV(b)).
~~All vaccines are excluded from the scope of this entry. See also ECCN 1C991.~~

1E001

"Technology" . . . for . . . 1C (except 1C351 to 1C354, . . .)
CB applies to "technology" for items
controlled by CB Column 1
1C351, 1C352, 1C353, or 1C354
(AG does not list technology for biological items)

1E350

"Technology" according to ~~the "General Technology Note"~~ AG "Related Technology" other than that controlled by 1E001 for ~~facilities designed or intended to produce~~ the "development", "production", or "use" of chemicals controlled by 1C350

(AG "Related Technology" is broader than the Wassenaar General Technology Note and is not limited to facilities designed or intended to produce chemicals).

1E351

~~"Technology" according to the "General Technology Note" for the disposal of chemicals or microbiological materials controlled by 1C350, 1C351, 1C352, 1C353, or 1C354~~

(AG does not list technology for disposal of chemicals or microbiological materials)

2B350

Related Controls:

(1) The controls in this entry do not apply to equipment that is (a) specially designed for use in civil applications . . . and (b) inappropriate . . . for use in storing, processing, producing or conducting and controlling the flow of chemical warfare agents or any of the chemical weapons precursors controlled by 1C350.

(2) The objective of 2B350 should not be defeated by the transfer of any non-controlled item containing one or more controlled components where the controlled component or components are the principal element of the item and can feasibly be removed or used for other purposes.

N.B.: In judging whether the controlled component or components are the principal element, the following factors should be weighed: quantity, value, technological know-how involved, and other special circumstances.

(3) The objective of 2B350 should not be defeated by the transfer of a whole plant, on any scale, which has been designed to produce any CW agent or AG-controlled precursor chemical (see 44.6(a)(3)).

j Incinerators designed to destroy chemical warfare agents, ~~or~~ chemical precursors controlled by ECCN 1C350 or chemical munitions . . .

2B351

Toxic gas monitoring systems~~;~~ and dedicated detectors ~~therefor,~~ as follows (see List of Items Controlled):

Related Controls: ~~N/A~~ Equipment for dissemination, detection, and identification of, and defense against, chemical agents and biological

agents are subject to the export licensing authority of the U.S. Department of State, Office of Defense Trade Controls (see 22 CFR part 121 Category XIV(c)).

2B352

Related Controls: ~~N/A~~ Equipment for dissemination, detection, and identification of, and defense against, chemical agents and biological agents are subject to the export licensing authority of the U.S. Department of State, Office of Defense Trade Controls (see 22 CFR part 121 Category XIV(c)).

(in 2B352.d "capable of" conforms with AG, even though EU uses "designed for")

2E001

"Technology" . . . for . . . 2B (except . . . 2B352, . . .)
CB applies to "technology" for equipment controlled by 2B350 ~~to 2B352~~ or 2B351

2E002

"Technology" . . . for . . . 2B (except . . . 2B352, . . .)
CB applies to "technology" for equipment controlled by 2B350 ~~to 2B352~~ or 2B351

2E301

"Technology" according to ~~the "General Technology Note"~~ AG "Related Technology" other than that controlled by 2E001 or 2E002 for the "development", "production", or "use" of Items controlled by 2B350, or 2B351 ~~and 2B352~~

APPENDIX 4-6 MTCR, NSG, and AG Technology Controls

The General Technology Note (GTN) in the Commerce Control List (CCL) 15 CFR 774 Supplement 2 part I is based on a Wassenaar text. This text includes the word "required" in quotation marks. The Wassenaar definition of "required" is:

> As applied to "technology", refers to only that portion of "technology" which is peculiarly responsible for achieving or exceeding the controlled performance levels, characteristics or functions. Such "required" technology may be shared by different products.

Comparable texts for Missile Technology Control Regime (MTCR), Nuclear Suppliers Group (NSG), and Australia Group (AG) technology controls also use the word "required" but do not include its Wassenaar definition. Without the Wassenaar definition, "required" can be construed to include any technology needed for the stated purpose, even though having no relevance to controlled performance levels, characteristics or functions. Therefore, perhaps unintentionally, MTCR, NSG, and AG technology controls may be interpreted more broadly than Wassenaar technology controls.

MTCR

The Missile Technology Control Regime (MTCR) Annex Introduction paragraph (b) states:

> The transfer of "technology" directly associated with any items in the Annex will be subject to as great a degree of scrutiny and control as will the equipment itself, to the extent permitted by national legislation. The approval of any Annex item for export also authorizes the export to the same end user of the minimum technology required for the installation, operation, maintenance, and repair of the item.

The MTCR definition of "technology" is as follows:

> "Technology" means specific information which is required for the "development", "production" or "use" of a product.

The information may take the form of "technical data" or "technical assistance".

(1) "Technical assistance" may take forms such as:
- instructions
- skills
- training
- working knowledge
- consulting services

(2) "Technical data" may take forms such as:
- blueprints
- plans
- diagrams
- models
- formulae
- engineering designs and specifications
- manuals and instructions written or recorded on other media or devices such as:
  - — disk
  - — tape
  - — read-only memories

Note: This definition of technology does not include technology "in the public domain" nor "basic scientific research"

(i) "In the public domain" as it applies to this Annex means technology which has been made available without restrictions upon its further dissemination. (Copyright restrictions do not remove technology from being "in the public domain".)

(ii) "Basic scientific research" means experimental or theoretical work undertaken principally to acquire new knowledge of the fundamental principles of phenomena and observable facts, not primarily directed towards a specific practical aim or objective.

The MTCR Annex does not define "directly associated with" nor "required". The Wassenaar definition may have been intended for "required" as it appears in the first sentence of the definition of "technology"; but it would not be logical to use it as the meaning of

"required" in the second sentence of the Annex Introduction paragraph (b).

NSG

The Nuclear Suppliers Group (NSG) Annex introductory materials includes the following statement on "Technology Controls":

> The transfer of "technology" is controlled according to the Guidelines and as described in each section of the Annex. "Technology" directly associated with any item in the Annex will be subject to as great a degree of scrutiny and control as will the item itself, to the extent permitted by national legislation.
> The approval of any Annex item for export also authorizes the export to the same end user of the minimum "technology" required for the installation, operation, maintenance, and repair of the item.
> Note: Controls on "technology" transfer do not apply to information "in the public domain" or to "basic scientific research".
> "in the public domain", as it applies herein, means technology that has been made available without restrictions upon its further dissemination. (Copyright restrictions do not remove technology from being in the public domain.)
> "basic scientific research" - Experimental or theoretical work undertaken principally to acquire new knowledge of the fundamental principles of phenomena and observable facts, not primarily directed towards a specific practical aim or objective.

A NSG Statement of Understanding states:

> The approval of any List item for export also authorizes the export to the same end user of the minimum technology required for the installation, operation, maintenance, and repair of the item.

The NSG definition of "technology" is as follows:

> "Technology" means specific information required for the "development", "production" or "use" of any item contained

in the List. This information may take the form of "technical data" or "technical assistance".

> "Technical assistance" may take forms such as instruction, skills, training, working knowledge, consulting services.
> Note: "Technical assistance" may involve transfer of "technical data".
> "Technical data" may take forms such as blueprints, plans, diagrams, models, formulae, engineering designs and specifications, manuals and instructions written or recorded on other media or devices such as disk, tape, read-only memories.

The general NSG statement on "Technology Controls" does not define "directly associated with" nor "required". The Wassenaar definition may have been intended for "required" as it appears in the first sentence of the definition of "technology"; but it would not be logical to use it as the meaning of "required" in the Statement of Understanding.

AG

Australia Group (AG) technology provisions are in Annex 3 and, therefore, apply only to chemical warfare agents, chemical precursors, and dual-use chemical manufacturing facilities and equipment and do not apply to biological items. Control item III in Annex 3 states:

> Related Technology
> The transfer of "technology", including licenses, directly associated with–
> – CW agents;
> – AG-controlled precursors; or
> – AG-controlled dual-use equipment items,
> to the extent permitted by national legislation.
> Controls on "technology" transfer do not apply to information "in the public domain" or to "basic scientific research".
>
> > "In the public domain", as it applies herein, means technology that has been made available without restrictions

upon its further dissemination. (Copyright restrictions do not remove technology from being in the public domain.)

"Basic scientific research" - Experimental or theoretical work undertaken principally to acquire new knowledge of the fundamental principles of phenomena or observable facts, not primarily directed towards a specific practical aim or objective.

The approval for export of any AG-controlled item of dual-use equipment also authorizes the export to the same end-user of the minimum "technology" required for the installation, operation, maintenance, or repair of that item.

The AG definition of "technology" is as follows:

specific information necessary for the "development", "production" or "use" of a product. The information takes the form of "technical data" or "technical assistance".

"Technical assistance" may take forms, such as instruction, skills, training, working knowledge, consulting services.
N.B. "Technical assistance" may involve transfer of "technical data".

"Technical data" may take forms such as blueprints, plans, diagrams, models, formulae, engineering designs and specifications, manuals and instructions written or recorded on other media or devices such as disk, tape, read-only memories.

AG Annex 3 control item III does not define "directly associated with", "necessary", or "required". Use of "necessary" rather than "required" in the AG definition of "technology" may indicate an intent to deviate from the Wassenaar General Technology Note use of the defined word "required". Use of the Wassenaar definition of "required" as that word appears in the AG "approval for export" sentence would not be logical. Wassenaar uses "necessary" rather than "required" in this context.

Chapter 5:
Encryption Export Controls

Chapter 5:
Encryption Export Controls

CHAPTER 5

ENCRYPTION EXPORT CONTROLS*

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* Ira S. Rubinstein co-authored this chapter. Mr. Rubinstein is Associate General Counsel for Microsoft Corporation. Edward W. Lew, an associate at McKenna & Cuneo, L.L.P., assisted in the preparation of this chapter.

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5.1 INTRODUCTION

Our work in this chapter departs from the format used elsewhere in this volume because a discussion of the controlled items must precede any discussion of the controls themselves. In addition, U.S. export controls of encryption items[1] have created constitutional law conflicts to a degree thus far unique to export controls. Until these issues were recently litigated,[2] export controls generally were deemed to be matters within the exclusive control of the Executive Branch of the federal government, thanks largely to many Congresses that authorized these controls without judicial review and to the federal courts that have considered them.[3] These conflicts have not been settled at this writing, and probably will be debated in many arenas in and out of government for many months to come.

Widespread applications of computer technology in telecommunications and "e-commerce" have created a strong demand for the protection of confidential information.

> Over the last decade, cryptography has moved from the highly secretive world of intelligence gathering into the mainstream of computer technology and electronic commerce. With ever increasing use of computer networks and electronic communications for the conduct of industry, government and personal affairs, business and consumers have come to rely on encryption to secure electronic funds transfers, protect proprietary and other sensitive information, and ensure the privacy and security of corporate databases, email, and other electronic records and transmissions (including wireless communications). With the growth of the Internet and various on-line services as well as government and industry plans to develop a framework for global electronic commerce, the international reliance on

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[1] "Encryption items" is both a generic term and a term that is defined by the Export Administration Regulations (EAR). See 15 C.F.R. § 772. See generally Albrecht Beutelspacher, Cryptology vii (1994) (hereinafter Beutelspacher), and Bruce Schneier, Applied Cryptography — Protocols, Algorithms, and Source Code in C (1993) (hereinafter Schneier).

[2] See discussion at Section 5.5, *infra*.

[3] See, *e.g.*, Spawr Optical v. United States, 685 F.2d 1076 (9th Cir. 1982); Bozarov vs. United States, 974 F.2d 1037 (9th Cir. 1992).

> encryption for protecting digital information continues to expand rapidly.[4]

Such protection is available through the use of strong encryption. Law enforcement and intelligence agencies, however, have vigorously lobbied the federal government to regulate strictly the dissemination of encryption technology, contending that their ability to decode or decrypt communications is a key to successful interdiction of drug traffickers, terrorists, and other adversaries of the United States. The regulatory compromise reached to date, as true of most compromises, leaves no one completely satisfied, and pressures for change from all quarters are relentless.

In this chapter, we turn first to a general survey of encryption: what it is, and how it is used. We then examine some of the principal elements of federal government controls of encryption exports, including an examination of the encryption export rules themselves. We next consider the impact of the litigation that has raised constitutional law concerns with the legality of export controls of encryption items. Finally, we examine possible directions that these controls will take in the future.

5.2 CRYPTOGRAPHY BASICS

Encryption or encoding of information has existed as long as civilization itself, but computer technology has escalated the pace of its development and capabilities to unprecedented levels. As two of its leading proponents have described it, encryption is

> . . . a transformation of a message that makes the message incomprehensible to anyone who is not in possession of secret information that is needed to restore the message to its normal *plaintext* or *cleartext* form. The secret information is called the *key*, and its function is very similar to the function of a door key in a lock: it unlocks the message so that the recipient can read it.[5]

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[4] See Ira S. Rubinstein, *Export Controls on Encryption Software, in* Coping with U.S. Export Controls 507, 509 (PLI Comm. Law & Practice Course Handbook Series No. A4-4544, Dec. 1998).

[5] Whitfield Diffie & Susan Landau, Privacy on the Line: The Politics of Wiretapping and Encryption 13 (1998).

5.2.1 Plaintext and Ciphertext

Plaintext can be words in any language, numerical data, or anything at all.[6] To communicate the plaintext to an intended recipient without unwanted interception, the sender will transform the text of the message in a way that makes the message unreadable to everyone except the intended recipient.[7] The text of this transformed message is called ciphertext.[8] Any procedure used to transform plaintext into ciphertext is called encryption or enciphering.[9] After encrypting the message, the sender will transmit the message in its ciphertext form.[10] Once encrypted, the sender may secretly transmit the message over any insecure medium, including telephone lines or computer networks.[11] Upon receipt of the encrypted message, the intended recipient will transform the text of the message from ciphertext back into plaintext through a procedure called decryption or deciphering.[12]

5.2.2 Algorithms and Keys

To communicate electronically by transforming the text of a message through cryptography, the sender and the intended recipient of the message need both a common algorithm and a common key.[13] A cryptographic algorithm or cipher is a computational procedure used to encrypt and decrypt messages.[14] The algorithm is used in tandem with a key, which is a numerical parameter that precisely directs the algorithm.[15] Taken as a whole, an algorithm with all possible plaintexts, ciphertexts, and keys makes up a cryptosystem or cipher system.[16] Significantly, the security of cryptography must

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[6] Douglas R. Stinson, Cryptography: Theory and Practice 1 (1995).

[7] Beutelspacher, *supra* note 1, at 2.

[8] Schneier, *supra* note 1, at 1.

[9] Beutelspacher, *supra* note 1, at 2–3.

[10] Schneier, *supra* note 1, at 1.

[11] Stinson, *supra* note 6, at 1.

[12] Beutelspacher, *supra* note 1, at 3.

[13] *Id.* at 2–3.

[14] Schneier, *supra* note 1, at 2; Beutelspacher, *supra* note 1, at 15.

[15] Beutelspacher, *supra* note 1, at, 5–6; U.S. Dep't of Commerce & Nat'l Sec. Agency, a Study of the International Market for Computer Software with Encryption, at A-2 (1995) [hereinafter Study].

[16] Schneier, *supra* note 1, at 4.

not depend on keeping the algorithm secret, but must depend on keeping the key secret.[17] In fact, many algorithms, including the Data Encryption Standard, are publicly available.[18]

5.2.3 Hardware and Software Implementations

Data encryption may be implemented in computer hardware or software.[19] Generally, hardware encryption provides a more secure method of communication because the encrypting hardware may be encapsulated in a tamper-proof box.[20] However, software encryption will likely predominate over hardware encryption in future personal computer-based networks because software encryption is generally less expensive, more flexible, and simpler to install and upgrade.[21]

5.2.4 "Crypto with a Hole"

Producers of data encryption products may capitalize on the benefits of cryptography without actually embedding any cryptographic features in the products themselves.[22] They may accomplish this feat by including a cryptographic application interface in their product.[23] This practice is known as creating "crypto with a hole."[24]

For example, a producer may create a computer that contains an empty security chip socket.[25] Such a computer would allow the computer user to purchase independently a security chip, install it into the computer, and benefit from data encryption.[26] With software, a producer may write a software program that, while containing no algorithm itself, provides for easy use of an encryption algorithm that the user may obtain elsewhere.[27] The U.S. Government treats

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[17] Beutelspacher, *supra* note 1, at 15.
[18] Schneier, *supra* note 1, at 267.
[19] Study, *supra* note 15, at III-3.
[20] Schneier, *supra* note 1, at 224.
[21] Study, *supra* note 15, at III-1.
[22] *Id.* at A-1.
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.*

products containing "crypto with a hole" as subject to encryption export controls, even though encryption capability is not present.

5.2.5 Symmetric and Asymmetric Algorithms

Cryptographic algorithms may be symmetric or asymmetric.[28] With a symmetric algorithm, or secret-key system, anyone who can encrypt a message is also able to decrypt that message because both processes use the same key.[29] In contrast, with an asymmetric algorithm, or public-key system, the key used to encrypt a message is different from the key used to decrypt that message.[30] A more detailed discussion of the variations on symmetric and asymmetric algorithms is well beyond the scope of this chapter.

In addition to intending to transmit a message secretly to another person so that no unauthorized person may gain knowledge of its content, it is also important to transmit a message to ensure that it arrives exactly as it was transmitted.[31] Data in a symmetric cryptosystem are subject to both passive and active attacks. With passive attacks, the message interceptor merely reads the intercepted message.[32] Standard encryption techniques, as described above, effectively defend against passive attacks. With active attacks, the message interceptor alters the content of the message and retransmits the message, in altered form, to the intended recipient.[33] This result is even worse than a passive attack because the recipient may not discern that the message has been altered, and it has led to the development of authentication.[34]

5.2.5.1 Authentication

Authentication is a process through which the intended recipient of a message can verify the identity of the sender and the integrity of the message.[35] To achieve these objects in a symmetric

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[28] *Id.*

[29] Beutelspacher, *supra* note 1, at 97; Study, *supra* note 15, at A-1.

[30] Schneier, *supra* note 1, at 4.

[31] Beutelspacher, *supra* note 1, at 45–47.

[32] *Id.* at 1.

[33] *Id.*

[34] *Id.* at 70.

[35] Study, *supra* note 15, at A-1.

system, the sender must send, together with the message text, an additional piece of information called a cryptographic checksum or a message authentication code (MAC). In a manner similar to the traditional encryption techniques discussed above, a MAC is derived through the use of an algorithm containing a one-way hash function and a key.[36] This additional information (sometimes referred to as an "electronic fingerprint") allows the receiver, after decrypting the information, to verify the integrity of the message and the authenticity of the sender. Thus, although an interceptor may freely alter the message, the recipient will be alerted to those alterations.[37]

In order to ensure that the message received is the same as the message sent, the intended recipient will apply the key from the received message to the algorithm and verify whether the result coincides with the received MAC.[38] If the received MAC does not coincide with the received message, then the intended recipient will know that someone has interfered with the message and will not trust the message.[39] If the received MAC does coincide with the received message, then the receiver can be reasonably certain that the message was not altered[40] because any unauthorized alterations would cause the MAC and the message not to coincide unless the individual altering the message can determine the MAC. This, of course, he cannot do without the key.[41]

The EAR remove from export control, except to embargoed countries and Syria:

> Data authentication equipment that calculates a Message Authentication Code (MAC) or similar result to ensure no alteration of text has taken place, or to authenticate users, but does not allow for encryption of data, text or other media other than that needed for the authentication [and] software required for the use of [such] equipment.[42]

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[36] Beutelspacher, *supra* note 1, at 70–71.

[37] *Id.* at 71.

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] This quotation was removed from 15 C.F.R. § 774 Supplement 1 ECCN 5A002 "Related Controls" (sic) paragraph on January 14, 2000. However, paragraph 3 of the "clarifications and interpretations" section of the "Supplementary Information" which introduced the January 14 regulation stated:

The definition of "required" in 15 C.F.R. § 772 is appropriate for describing what is controlled but is illogical when used to describe what is not controlled.

5.2.5.2 Key Management in Symmetric Systems

Because every person in a symmetric system must have a key in common with every other person in that system, key management can become an unwieldy task in large systems.[43] Key management includes the "generation, distribution, entry and destruction of the key settings."[44]

5.2.5.3 Keys and Digital Signatures in Asymmetric Systems

Each participant in an asymmetric setting has one pair of keys: a public key for encrypting and a private key for decrypting.[45] All public keys are publicly available, but private keys are kept secret.[46] In such an arrangement, it is not possible for participant A to obtain participant B's private key by using participant B's public key.[47]

As with symmetric systems, asymmetric systems are subject to both passive and active attacks. Through the use of private and

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> It was not the intent of the new Wassenaar language for ECCN 5A002 to be more restrictive concerning Message Authentication Codes (MAC). "Data authentication equipment that calculates a Message Authentication Code (MAC) or similar result to ensure no alteration of text has taken place, or to authenticate users, but does not allow for encryption of data, text or other media other than that needed for the authentication" continues to be excluded from control under 5A002. These commodities are controlled under ECCN 5A992.

MAC software is similarly controlled by 5D992 rather than 5D002 because of the following 5D002 "Related Controls" (sic) statement:

> This entry does not control "software" "required" for the "use" of equipment excluded from control under 5A002 or "software" providing any of the functions of equipment excluded from control under 5A002.

[43] *Id.* at 101–02.
[44] Study, *supra* note 15, at A-2.
[45] Beutelspacher, *supra* note 1, at 98.
[46] *Id.*
[47] *Id.*

public keys, as discussed above, asymmetric systems effectively defend against passive attacks, during which the message interceptor merely reads the intercepted message.[48] To defend against active attacks, during which the message interceptor alters the content of the message and retransmits the message to the intended receiver, asymmetric systems may employ digital signatures.[49] Digital signatures are similar to MACs because both use one-way hash functions to transform the message.[50] Like handwritten signatures, digital signatures provide authentication.[51] Unlike handwritten signatures, however, digital signatures are not appended onto the original message.[52] Rather, digital signatures are intimately related to the entire message because the one-way hash function transforms every character of the message text.[53] As a result, no unauthorized person can make undetectable alterations to a message that is protected with a digital signature.[54]

Asymmetric algorithms are nonetheless imperfect. They cannot be both secure beyond any reasonable doubt and fast.[55] For that reason, many systems employ hybrid cryptography, where the participants use a symmetric algorithm for encrypting stored or transmitted data and an asymmetric algorithm only for key distribution.[56] As a result, the asymmetric algorithm does not act as a bottleneck to the entire system because keys are very short messages that are not frequently distributed.[57]

5.3 EVOLUTION OF U.S. ENCRYPTION POLICY

U.S. Government encryption export control policy has dramatically changed over the years.

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[48] *Id.* at 98–102.
[49] Schneier, *supra* note 1, at 34–35; Beutelspacher, *supra* note 1, at 1.
[50] Study, *supra* note 15, at A-1; Schneier, *supra* note 1, at 31.
[51] Beutelspacher, *supra* note 1, at 103.
[52] Stinson, *supra* note 6, at 203.
[53] Beutelspacher, *supra* note 1, at 104.
[54] *Id.*
[55] *Id.* at 102.
[56] Study, *supra* note 15, at A-2.
[57] Beutelspacher, *supra* note 1, at 120.

5.3.1 Encryption in the Computer Age

Over the past 40 years, the world has seen a dramatic increase in the use of cryptography. From the 1950s to the 1970s, the United States Government was the principal purchaser of encryption equipment.[58] In the 1970s, however, the financial market began to employ data cryptography for authenticating electronic fund transfers.[59] Finally, beginning in the 1980s, applications for data cryptography emerged in the industrial sphere and began to expand rapidly.[60]

This trend prompted the development of an industry standard because there was a lack of interoperability among commercial cryptographic products.[61] In addition, buyers did not know what type of cryptography they were buying because there was no independent entity to certify the level of security that such products provided.[62] This situation gave rise to the Data Encryption Standard (DES).[63]

5.3.2 Data Encryption Standard (DES)

As a United States and international standard, DES is the most widely used encryption algorithm in the world.[64] DES was adopted as a federal government standard in July 1977 to protect sensitive unclassified information.[65] Subsequently, the American National Standards Institute approved DES as a private-sector standard in 1981 and called it the Data Encryption Algorithm (DEA).[66]

DES is a symmetric algorithm that can encrypt and decrypt messages.[67] In contrast, the Rivest, Shamir, and Adelman (RSA) algorithm is an asymmetric algorithm that can both produce digital

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[58] Study, *supra* note 15, at III-24.

[59] *Id.*

[60] *Id.*

[61] A. Michael Froomkin, *The Metaphor is the Key: Cryptography, The Clipper Chip, and the Constitution*, 143 U. Pa. L. Rev. 709, 735 (1995).

[62] Schneier, *supra* note 1, at 265.

[63] *Id.* at 265–67.

[64] *Id.* at 17; Stinson, *supra* note 6, at 70.

[65] Revision of Federal Information Processing Standard (FIPS), 46-1 Data Encryption Standard (DES), 58 Fed. Reg. 69,347, 69,348 (1993).

[66] Schneier, *supra* note 1, at 267.

[67] *Id.* at 270.

signatures and encrypt and decrypt messages.[68] Also, the Digital Signature Algorithm (DSA) is another asymmetric algorithm that can produce digital signatures, but DSA cannot encrypt or decrypt messages.[69] Finally, the Diffie-Hellman algorithm, which was the first asymmetric algorithm, can provide key distribution, but it cannot encrypt or decrypt messages.[70] A current compilation of many other encryption products may be found in a recent study of foreign encryption products.[71]

The level of security provided by a symmetric cryptosystem depends on the strength of the algorithm and the length of the key. With a strong algorithm, the best way to break the cryptosystem is to try every possible key in a brute force attack.[72] Thus, a cryptosystem that has a longer key will be more difficult to break.

> Calculating the complexity of a brute-force attack is easy. If the key is 8 bits long, there are 2^8, or 256, possible keys. Therefore, it will take 256 attempts to find the correct key, with a 50 percent chance of finding the key after half of the attempts. If the key is 56 bits long, there are 2^{56} possible keys.[73]

In contrast, attacking an asymmetric algorithm does not entail trying every possible key. Instead, breaking these algorithms involves trying to factor a large number that is the product of two large prime numbers.[74] The process of factoring large numbers has been historically very difficult but becomes moderately easier as computing speed increases.[75]

DES has a key length of 56-bits.[76] Because DES is over 20 years old and computing speed doubles nearly every year, however,

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[68] *Id.* at 17.

[69] *Id.*

[70] *Id.* at 513.

[71] Lance J. Hoffman et al., Growing Development of Foreign Encryption Products in the Face of U.S. Export Regulations (Cyberspace Pol'y Inst., The George Washington Univ., June 1999).

[72] Schneier, *supra* note 1, at 151

[73] *Id.*

[74] *Id.* at 158.

[75] *Id.* at 159.

[76] *Id.* at 270.

DES is vulnerable to attack.[77] One solution for this problem is to adopt a new standard.[78] The federal government for some time tried to adopt an Escrowed Encryption Standard (EES),[79] where it retains a copy of the keys needed to decrypt all communications.[80] However, EES addressed the weaknesses of DES only to the extent that it used an 80-bit algorithm. Industry opposition to the EES has been so adamant that the government finally abandoned its position.[81] Nonetheless, it is important to understand the concerns that underlay the government's position.[82]

The National Institute of Standards and Technology (NIST) has now embarked on a new effort to replace DES with the Advanced Encryption Standard (AES). The U.S. Government recently published a notice of request for candidate AES encryption algorithms. The new algorithm must support key sizes of 128 bits, 192 bits, and 256 bits.[83]

5.3.3 National Security and Law Enforcement Concerns

The government made three basic arguments in support of the EES. For one, it contended that American citizens benefit from EES because EES enables law enforcement agencies to continue conducting wiretaps, which are an important crime-fighting and

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[77] Froomkin, *supra* note 61, at 738. In 1998, the Electronic Frontier Foundation won the annual RSA competition to "crack" DES, and did so in 56 hours using ordinary electronic components. See Electronic Frontier Found., Cracking DES: Secrets of Encryption Research, Wiretap Politics and Chip Design (1998); John Schwartz, *One High-End PC Cracks Data-Scrambling System; Privacy Groups Say Export Curbs Undercut*, Wash. Post, July 18, 1998, at A9.

[78] Froomkin, *supra* note 61, at 742.

[79] *Id.* at 743.

[80] *Id.*

[81] Stewart A. Baker & Elizabeth A. Banker, *The New Encryption Export Policy: The U.S. Government Rethinks Key Recovery, in* Coping with U.S. Export Controls 589 (PLI Comm. Law & Practice Course Handbook Series No. A4-4544, Dec. 1998).

[82] "Government" in this context is not a monolith. Concerns of the intelligence community (the CIA and NSA) and the law enforcement community (the FBI and state and local law enforcement agencies) do not necessarily converge in every respect. See *id.*

[83] NIST hosts a Web page devoted to "AES Development Efforts" at http://csrc.nist.gov/encryption/aes/aes_home.htm.

evidentiary tool.[84] It also argued that EES is necessary to maintain the nation's communications intelligence capabilities, which are protected by laws and policies designed to prevent exports of strong cryptography from the United States.[85] Finally, it maintained that if the NSA designs and certifies a system as secure, then the government has an obligation to prevent criminals and foreign governments from using that cryptosystem.[86]

5.3.4 Industry Critique

The government's arguments were met by several counter arguments. For one, court-ordered wiretaps are somewhat rare — only an approximate average of 800 wiretaps are ordered per year for all federal, state, and local law enforcement agencies combined.[87] For another, domestic software manufacturers assert that United States export controls on cryptographic software unfairly places domestic firms at a disadvantage in foreign markets,[88] and have produced convincing data demonstrating that strong cryptographic software is widely available overseas.[89] In addition, software manufacturers claim that the software export controls are ineffective and computer users in foreign countries may easily download strong algorithms from the Internet.[90] Furthermore, citing the risk of civil liability and criminal punishment, export control critics claim that software companies are unwilling to include advanced cryptography in their products, even for sale in the United States, because no company can control distribution of its products with certainty. Finally, the implementation of a government key recovery system, such as EES, provides no better alternative. Such recovery systems are insecure, expensive, and difficult to maintain.[91]

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[84] Froomkin, *supra* note 61, at 743.

[85] *Id.* at 744, 748.

[86] *Id.* at 744.

[87] Administrative Office of the U.S. Courts, 1993 Report on Applications for Orders Authorizing or Approving the Interception of Wire, Oral, or Electronic Communications 4 (1993).

[88] Study, *supra* note 15, at I-1.

[89] *Id.* See also, Hoffman, *supra* note 71.

[90] Study, *supra* note 15, at I-1.

[91] *Id.* at III-4. For a general critique of the government's key recovery policy, see Center for Democracy and Tech., The Risks of Key Recovery, Key Escrow, and

5.3.5 Liberalization

U.S. controls have become progressively less restrictive.

5.3.5.1 Early Relaxation

Concerns with foreign competition have persisted for many years. The industrial, financial, and scientific communities have continually lobbied the government to liberalize its encryption export policy. Originally, encryption items were regulated under the ITAR.[92] In 1983, however, the government began gradually to liberalize its export regulation of cryptographic products,[93] and in that year NSA and the State Department began to allow exporters to use distribution licenses to export cryptographic equipment through foreign distributors.[94] This reform eliminated the need for exporters to apply to the State Department for each export license in those circumstances, saving both time and money.[95]

5.3.5.2 Early Transfers from State to Commerce

In 1987, the government began transferring certain types of cryptography, on a case-by-case basis, to the less restrictive jurisdiction of the Commerce Department.[96] Significant encryption items included here were non-confidentiality products, products designed for microcomputers that employed non-standard and non-strategic cryptography, and products with key lengths of 40 bits or

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Trusted Third Party Encryption: A Report by an Ad Hoc Group of Cryptographers and Computer Scientists (1998), available at http://www.cdt.org/crypto/risks98/. The report argues that law enforcement requirements for key recovery are almost wholly incompatible with those of commercial encryption users (*e.g.*, requirements for access without notice to the user; ubiquitous international adoption of key recovery; around-the-clock access to plaintext; and recovery of communications traffic as well as stored data); and that "key recovery systems are inherently less secure, more costly, and more difficult to use than similar systems without a key recovery feature."

[92] John R. Liebman & Kristen E. Green, *Encryption Software Export Regulations and Free Speech*, Los Angeles Lawyer, Oct. 1997, at 21.

[93] Study, *supra* note 15, at II-1 ff.

[94] *Id.*

[95] *Id.*

[96] *Id.* at II-3–II-5.

less. Also included were less significant items, such as cryptographic cellular handsets, products designed for electronic commerce, and a number of decryption-only products.[97]

The Administration announced licensing reforms in 1994.[98] Vendors were allowed to distribute certain cryptographic products directly from the United States to foreign customers without using a foreign distributor and without prior State Department approval for each export.[99] In addition, the government created a personal-use exemption that allowed temporary export, without prior approval, of cryptographic products when intended for personal use.[100]

5.3.5.3 Industry Call for More Relaxation

Despite these reforms, U.S. software developers still asserted that the government had failed to keep pace with the increasing demand for strong cryptography.[101] These persistent concerns prompted the Commerce Department and the NSA, at the request of the President's National Security Advisor, to conduct a study of the international market for computer software.[102] Through that study, the Commerce Department and the NSA determined the extent to which United States export controls affect the international cryptographic software industry.[103] In response to these concerns, the president issued Executive Order 13,026 (the "Executive Order") in December 1996, transferring the regulation of most cryptographic hardware and software from the State Department to the Commerce Department.[104]

According to the joint Commerce Department-NSA study, the United States generally held a majority share of the international encryption software market.[105] In addition, the study indicated that, in most countries, the United States' share of the encryption software

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[97] *Id.*
[98] *Id.* at II-5.
[99] *Id.*
[100] *Id.*
[101] *Id.* at II-6.
[102] *Id.* at I-1.
[103] *Id.* at II-1.
[104] Exec. Order No. 13,026, 61 Fed. Reg. 58,767 (1996).
[105] Study, *supra* note 15, at III-7.

market was keeping pace with overall demand.[106] Specifically, the study indicated that the effect of United States export controls on general-purpose software with encryption, which is software not primarily designed for encryption, was probably negligible because there is virtually no foreign competition in this market.[107] However, the study indicated that the effect of United States export controls on the competitive market for security-specific encryption software, the principal purpose of which is to provide security-related services, was less certain.[108] Moreover, as indicated above, many of these findings have been mooted by later studies showing that foreign encryption software developers are now challenging U.S. exporters for dominance in this dynamic market.[109]

5.3.5.4 Relaxation of Controls

Since 1996, Commerce controls have been periodically relaxed, culminating in a major revision which became effective on January 14, 2000.

5.4 REGULATORY SCHEME

The January 14, 2000, regulation was lengthy and detailed but did not revise or refer to many relevant sections of the EAR. Despite these numerous rules, two important points are omitted: (1) encryption items generally described in the regulations as "EI" are not identified and (2) there is no indication whether encryption items are eligible for License Exceptions for which they are neither explicitly eligible nor explicitly ineligible. Also, there are many internal inconsistencies and anomalies, which leave in doubt the extent of the fundamental restrictions and exceptions.

5.4.1 EAR References

EAR references to encryption, in the order that they appear in the regulations for the first mention of each subject, are as follows:

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[106] *Id.*

[107] *Id.* at III-9, A-2.

[108] *Id.* at III-10, A-2.

[109] See Hoffman, *supra* note 71.

— 15 C.F.R. §§ 732.2(b), 734.3(b)(3), 734.7(c), 734.8(a), 734.9, and 774 Supplement 1 ECCN 5D002 second Note: Software controlled for EI reasons under ECCN 5D002 is excepted from the publicly available software exclusion from "subject to the EAR."

— 15 C.F.R. § 732.2(b)(1): You may not proceed to export publicly available technology or software if you are a U.S. person and the export is subject to General Prohibition Seven, which includes § 744.9 restrictions on technical assistance by U.S. persons with respect to encryption items.

— 15 C.F.R. § 734.2(b)(2): Software subject to "EI" controls is excluded from the rule that release of source code to a foreign national is deemed to be an export.

— 15 C.F.R. § 734.3(b)(2) and (b)(3) Note: Printed material setting forth encryption source code is not subject to the EAR but encryption source code in electronic form remains subject to the EAR.

— 15 C.F.R. § 734.2(b)(9): The term "export of encryption source code and object code software controlled for EI reasons under ECCN 5D002" is defined as an actual transfer out of the United States (or in the United States to an embassy or affiliate of a foreign country), including, except for software eligible for § 740.13(e) or 740.17(a)(5)(i), downloading outside the United States or making available for transfer outside the United States in the absence of precautions adequate to prevent unauthorized transfer.

— 15 C.F.R. §§ 734.2(b)(9)(ii), 734.7(c), 734.8(a), 734.9, 740.13(e), 740.17(a)(5)(i, iv): Source code controlled under 5D002 which would be considered publicly available under 734.3(b)(3) is released from "EI" controls and eligible for License Exceptions TSU or ENC, except to embargoed countries or Syria, provided BXA is notified prior to export.

— 15 C.F.R. § 734.4(b) and 15 C.F.R. § 740.17(d): Items controlled for EI reasons under ECCNs 5A002, 5D002, and 5E002 are not eligible for the *de minimis* exclusion from "subject to the EAR"; but items classified ECCN 5A992, 5D992, or 5E992 "may be" eligible for that exclusion. Foreign products developed with or incorporating U.S.-origin encryption

source code, components or toolkits remain subject to the EAR but do not require review and classification by BXA and can be exported or reexported without further authorization.

— 15 C.F.R. § 734.4(h): Software controlled for "EI" reasons under ECCN 5D002 or technology controlled for "EI" reasons under ECCN 5E002 do not lose their U.S.-origin when redrawn, used, consulted, or otherwise commingled abroad in any respect with other software or technology of any other origin.

— 15 C.F.R. § 736: Each of Ten General Prohibitions affects encryption items.

— 15 C.F.R. § 738 Supplement 1 and 15 C.F.R. § 774 Supplement 1 ECCNs 5A002, 5A992, 5D002, 5D992, 5E002, and 5E992 License Requirements sections: The Country Chart shows that, absent an applicable License Exception, a license is required to all countries except Canada for ECCNs 5A002, 5D002, and 5E002 (NS Column 1); to embargoed countries and Syria for ECCNs 5A992.a, 5D992.a.1 and b.1, and 5E992.a (AT Column 1); and only to embargoed countries for ECCNs 5A992.b, 5D992.a.2, b.2, and c, and 5E992.b (AT Column 2).

— 15 C.F.R. §§ 740.8 and 742 Supplement 4: Key escrow and key recovery encryption software and equipment of any key length controlled under ECCNs 5A002 or 5D002 meeting specified key recovery, interoperability, and design, implementation and operational assurance features are eligible for the key management infrastructure (KMI) License Exception after classification by BXA following a technical review.

— 15 C.F.R. §§ 740.9(a)(2)(i), 770.2(m) Interpretation 13, and 774 Supplement 1 Category 5 Part 2 Note 2: Laptop computers loaded with encryption software controlled for "EI" reasons under ECCN 5D002 are eligible for License Exception TMP.

— 15 C.F.R. §§ 740.11(a)(3) and 740.11 Supplement 1(a)(4) and (b)(4): EI items are ineligible for the international safeguards and cooperating governments' portions of License Exception GOV.

— 15 C.F.R. § 740.12(a)(2)(i)(A): ECCNs 5A002, 5D002, and 5E002, being controlled for national security (NS) reasons, are ineligible for License Exception GFT.

— 15 C.F.R. §§ 740.13 introductory paragraph, 740.13(d)(2), and 774 Supplement 2 General Software Note: Encryption software is ineligible for the "mass market" software portion of License Exception TSU.

— 15 C.F.R. §§ 740.14(f), 770.2(m) Interpretation 13, and 774 Supplement 1 Category 5 Part 2 Note 2: EI software controlled under 5D002 is eligible for License Exception BAG.

— 15 C.F.R. § 740.17(a)(1), (b), (g)(1)(i): Encryption commodities, software, and technology under ECCNs 5A002, 5D002, and 5E002 of any key length and whether or not with an open cryptographic interface may be exported or reexported, other than to embargoed countries or Syria and except for any sale or retransfer outside of the U.S. company, to foreign subsidiaries of U.S. companies under License Exception ENC without review and classification and with no reporting requirements.

— 15 C.F.R. § 740.17(a)(1): U.S. firms may transfer under License Exception ENC encryption technology (5E002) to their foreign employees in the United States, except to nationals of embargoed countries or Syria.

— 15 C.F.R. §§ 740.17(a)(2), (a)(5)(ii-iv) and (b, c, e-h), 742.15 (b)(2), 742 Supplement 6, and 770.2(n) Interpretation 14: Encryption commodities and software under ECCNs 5A002 or 5D002 without an open cryptographic interface may be exported or reexported other than to embargoed countries or Syria to any non-government end-user after review and classification by BXA under License Exception ENC.

— 15 C.F.R. §§ 740.17(a)(3,4) and (b, c, e-h), 742.15(b)(2), 742 Supplement 6, and 770.2(n) Interpretation 14: "Retail" encryption commodities and software under ECCNs 5A002 or 5D002 without an open cryptographic interface may be exported or reexported other than to embargoed countries or Syria to any end-user after review and classification by BXA under License Exception ENC and with no reporting requirements if to individual consumers.

— 15 C.F.R. §§ 740.17(e)(2), (g)(1)(ii, iii, vi). Finance-specific and 56-bit products previously reviewed and classified by BXA can be exported or reexported to any end-user without further

review and with no reporting requirements. Other encryption commodities, software or components previously approved for export can be exported and reexported without further review to any non-government end-user.

— 15 C.F.R. §§ 742.8(a)(2) and 742.10(a)(2): ECCN 5A992 does not require a license for reexport to Iran or Sudan.

— 15 C.F.R. §§ 742.15(a), 774 Supplement 1 Category 5 Part 2 Note 3, ECCN 5A002 Related Controls, and ECCN 5A002.a.1: A license is required for exports and reexports to all destinations except Canada for "EI" items, including ECCNs 5A002, 5D002, and 5E002.

— 15 C.F.R. § 742.15(b)(1), 774 Supplement 1 Category 5 Part 2 Note 3 Cryptography Note, 774 Supplement 1 ECCNs 5A992, 5D992, and 5E992: Encryption commodities, software, and technology eligible for classification under ECCNs 5A992, 5D992, or 5E992, *i.e.*, exportable to all destinations except embargoed countries and Syria, include symmetric algorithm up to 56 bits, or up to 64 bits if mass market, and asymmetric algorithm up to 512 bits.

— 15 C.F.R. § 742.15(b)(3): Exporters may apply for an Encryption Licensing Arrangement for export to strategic partners of U.S. companies of items not eligible for a License Exception.

— 15 C.F.R. § 744.9: No U.S. person may, without a license aid a foreign person to develop or manufacture outside the United States encryption commodities or software controlled for "EI" reasons under ECCNs 5A002 or 5D002.

— 15 C.F.R. § 748 Supplement 2(c): License applications involving items controlled by both Category 4 (computers) and Category 5 (telecommunications) are to be submitted according to the principal function of the equipment.

— 15 C.F.R. § 752.3(a)(5): EI items are ineligible for the Special Comprehensive License.

— 15 C.F.R. § 758.3(h)(2): The applicable License Exception symbol must be shown on the Shipper's Export Declaration.

— 15 C.F.R. § 762.2(b)(6): Encryption records described in 15 C.F.R. § 742.15 must be retained.

— 15 C.F.R. §§ 764 and 766: Enforcement regulations apply.

— 15 C.F.R. § 772: The following encryption-related terms are defined:

- "asymmetric algorithm"
- "bank"
- "business unit"
- "commodity"
- "cryptoanalysis"
- "cryptography"
- "effective control"
- "encryption component"
- "encryption items"
- "encryption licensing arrangement"
- "encryption object code"
- "encryption software"
- "encryption source code"
- "financial institution"
- "fixed" (cryptography or key variables references)
- "government end-user"
- "information security"
- "multilevel security"
- "open cryptographic interface"
- "person"
- "recoverable commodities and software" (as applied to encryption items)
- "required"
- "strategic partner (of a U.S. company)" (as applied to encryption items)
- "U.S. subsidiary" (as applied to encryption items)

— 15 C.F.R. § 774 Supplement 1 Category 5 Part 2 Note 1: The control status of information security items is determined in Category 5 part 2 even if they are components or "electronic assemblies" of other equipment.

— 15 C.F.R. § 774 Supplement 1 ECCNs 5A002, 5D002, 5E002: "EI" applies to encryption items transferred from the United States Munitions List (USML) to the Commerce Control List (CCL) consistent with Executive Order (EO) 13,026 of November 15, 1996.

— 15 C.F.R. § 774 Supplement 1 ECCNs 5A002, 5B002, 5D002, 5E002 License Requirement Notes: Reporting is required pursuant to 743.1 of exports under License Exceptions.

— 15 C.F.R. § 774 Supplement 1 ECCN 5D002 Note: For export licensing purposes, encryption software is treated under the EAR in the same manner as a commodity included in ECCN 5A002.

5.4.2 Omissions

Important points concerning the meaning of "EI" and encryption item eligibility for various License Exceptions are omitted from the EAR.

5.4.2.1 "EI"

The EAR does not identify which items are "EI."

The letters "EI" apply only to encryption items transferred from the USML to the CCL consistent with EO 13026 of November 15, 1996.[110] Thus, EI does not apply to encryption items which were on the CCL before the 1996 transfer. As indicated in section 5.4.1 above, many of the regulations apply to "EI" items, rather than to all encryption items. However, nowhere in the EAR is there an identification of which encryption items are EI and which are not. Even an exporter who researches pre-1996 and post-1996 State and Commerce control lists cannot determine which items are "EI," because unpublished commodity jurisdiction determinations affect what was transferred.

It is believed that, immediately prior to the January 14, 2000, liberalization, all EI items were controlled by ECCNs 5A002, 5D002, or 5E002 and only encryption items on the CCL before the 1996 transfer were properly classified under ECCNs 5A992, 5D992, or 5E992. If that is correct, after the January 14, 2000, liberalization, some EI items are now properly classified under 5A992, 5D992, or 5E992. This is implied by the statement in 15 C.F.R. § 742.15(a) that EI items "include" those controlled under 5A002, 5D002, and 5E002.

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[110] 15 C.F.R. § 774 Supplement 1 ECCNs 5A002, 5D002, and 5E002 License Requirement Notes.

Since having two control regimes for 5A992, 5D992, and 5E992, one for EI items and the other for non-EI items, is probably not intended, the "EI" designation does not appear to serve any useful current purpose.

5.4.2.2 Silent License Exceptions

The EAR is silent as to encryption item eligibility for many License Exceptions. Encryption items are explicitly eligible for License Exceptions KMI, ENC, the tools of trade portion of TMP, BAG, and the unrestricted encryption source code portion of TSU. Encryption items are explicitly ineligible for License Exceptions LVS, GBS, CIV, TSR, the international safeguards and cooperating government portions of GOV, GFT, and the mass market software portion of TSU. The EAR is silent as to whether encryption items are eligible for any of the other License Exceptions.

The silent ones which are reasonable candidates for encryption item eligibility include: TMP (other than tools of trade and to a U.S. subsidiary), RPL, U.S. Government and Chemical Weapons Convention portions of GOV, operation, sales, and software updates portions of TSU, equipment and spare parts for a vessel or aircraft portion of AVS, and APR.[111]

One might conclude that License Exceptions do apply when they are silent. The EAR states: "A person may undertake transactions subject to the EAR without a license or other authorization, unless the regulations affirmatively state such a requirement."[112] It might be argued that this general rule is overridden, at least for software, by the EAR statement that encryption software is not accorded the same treatment under the EAR as other software.[113] However, perhaps all the intended differences have already been identified.

5.4.3 Inconsistencies and Anomalies

This section lists inconsistencies and anomalies within the EAR directly related to encryption.[114]

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[111] 15 C.F.R. §§ 740.9, 740.10, 740.11, 740.13, 740.15, and 740.16.

[112] 15 C.F.R. § 736.1.

[113] 15 C.F.R. § 774 Supplement 1 ECCN 5D002.

[114] See Appendix 6-1 for other EAR inconsistencies and anomalies which are indirectly related to encryption.

— "EI" is limited to items transferred from State to Commerce in 1996.[115] However, the EAR also states that "EI" stands for "encryption items"[116] and defines "encryption items" as including "all encryption commodities, software, and technology that contain encryption features and are subject to the EAR."[117]

— Only software controlled for "EI" reasons under ECCN 5D002 is excepted from the publicly available software exclusion from "subject to the EAR."[118] However, the EAR statement that encryption source code in electronic form remains subject to the EAR is not limited to EI items nor to ECCN 5D002,[119] leaving in doubt whether publicly available EI source code in electronic form controlled under 5D992 is subject to the EAR.

— Printed material setting forth encryption source code qualifies for the publicly available exclusion from "subject to the EAR," whereas the same information in electronic form does not.[120]

— It is not apparent why embargoed countries and Syria are disqualified from the publicly available rules in §§ 740.13(e) and 740.17(a)(5)(i), since the concept of "publicly available" is that such items cannot be controlled to any destination.

— The 15 C.F.R. § 770.2(m) limitation of eligibility for License Exceptions BAG and the tools of trade portion of TMP for laptop computers loaded with encryption software to software controlled for "EI" reasons under ECCN 5D002 leaves in doubt whether there is any non-EI software under 5D002 which is not eligible. The omission of any reference to 5D002 in 15 C.F.R. § 740.14(f) leaves in doubt whether there is any EI software under 5D992 which is ineligible for BAG to embargoed countries or Syria.

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[115] 15 C.F.R. § 774 Supplement 1 ECCNs 5A002, 5D002, and 5E002 Reason for Control texts.

[116] 15 C.F.R. § 742.15(a) includes this statement and refers to part 772 for the definition of "encryption items."

[117] 15 C.F.R. § 772.

[118] 15 C.F.R. § 734.3(b)(3).

[119] 15 C.F.R. § 734.3(b)(2) and (b)(3) Note.

[120] 15 C.F.R. § 734.3(b)(2) and (b)(3) Note.

— The EAR statement that you may not proceed to export publicly available technology or software if you are a U.S. person and the export is subject to General Prohibition Seven,[121] does not appear as an exception in the operative rule that publicly available technology and software is not subject to the EAR.[122]

— The definition of "export of encryption source code and object code software controlled for EI reasons under ECCN 5D002"[123] does not apply to exports to embargoed destinations or Syria of software controlled under ECCN 5D992. If none of the precautions in that definition need be taken with respect to 5D992 software, controls on 5D992 exports to Syria would probably be ineffective and there would be no reason to keep 5D992 on the Commerce Control List (EAR99 covers software not elsewhere specified for export to embargoed destinations). The lack of a license requirement for 5A992 reexports to Iran and Sudan[124] indicates that the need for 5A992 is also marginal.

— The EAR statement that items classified ECCN 5A992, 5D992, or 5E992 "may be" eligible for *de minimis*[125] is followed by "(refer to 742.15(b)(1)." However, there is nothing in § 742.15(b)(1) which is relevant to the *de minimis* exclusion. Since only EI items controlled under 5A002, 5D002, or 5E002 are excepted from *de minimis*, items otherwise controlled under 5A992, 5D992, or 5E992 *are*, not "may be," eligible for *de minimis*.

— The EAR statement that software controlled for "EI" reasons under ECCN 5D002 and technology controlled for "EI" reasons under ECCN 5E002 do not lose their U.S.-origin when redrawn, used, consulted, or otherwise commingled abroad in any respect with other software or technology of any other origin[126] implies that software or technology otherwise controlled by 5D992 or 5E992 does lose its U.S.-origin when commingled abroad. However, this implication is inconsistent with the statement that

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[121] 15 C.F.R. § 732.2(b)(1).
[122] 15 C.F.R. § 734.3(b)(3).
[123] 15 C.F.R. § 734.2(b)(9)(ii).
[124] 15 C.F.R. §§ 742.8(a)(2) and 742.10(a)(2).
[125] 15 C.F.R. § 734.4(b).
[126] 15 C.F.R. § 734.4(h).

commingled U.S.-origin software and technology in quantities exceeding *de minimis* levels are subject to the EAR.[127]

— The EAR states: "Foreign products . . . incorporating U.S.-origin encryption source code, components or toolkits remain subject to the EAR but do not require review and classification by BXA and can be exported or reexported without further authorization."[128] This permits reexports to all destinations except embargoed destinations or Syria of the specified U.S.-origin encryption items when incorporated in foreign-made items even if the 25 per cent *de minimis* limit[129] is exceeded. Therefore, the statements that there is no *de minimis* level for 5A002, 5D002, and 5E002[130] and that U.S.-origin 5D002 software and 5E002 technology do not lose their U.S.-origin when commingled with items of any other origin[131] are misleading. Any intended substantive consequence of the phrase "remain subject to the EAR" should be stated, since none is apparent.

— 15 C.F.R. § 740.17(a)(1) refers to "foreign subsidiaries of U.S. companies (as defined in part 772)." However, the term defined in part 772 is "U.S. subsidiary."

— The terms used in the Cryptography Note,[132] in the description of "retail,"[133] and in the mass market software portion of License Exception TSU[134] are similar; but what appear to be needless differences are confusing. There are no apparent differences in meaning between:

  - "retail selling points" vs. "retail outlets independent of the manufacturer" plus "sales directly by the manufacturer for consumer use";
  - "from stock" vs. "not customized";

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[127] 15 C.F.R. § 734.3(a)(3).
[128] 15 C.F.R. § 740.17(d).
[129] 15 C.F.R. § 734.4(d).
[130] 15 C.F.R. § 734.4(b).
[131] 15 C.F.R. § 734.4(h).
[132] 15 C.F.R. § 774 Supplement 1 Category 5 Part 2 Note 3.
[133] 15 C.F.R. § 740.17(a)(3).
[134] 15 C.F.R. § 740.13(d) and 774 Supplement 2.

- "designed for installation by the user without further substantial support by the supplier" vs. "not require substantial support for installation and use"; and
- "electronic" vs. "intangible."

Different expressions should not be used to convey the same meaning. Conversely, if different meanings are intended, they should be apparent to the reader.

— The Cryptography Note is used to condition a greater degree of liberalization than "retail." It is, therefore, irrational to make "intangible" transfers ineligible for "retail" sales through outlets independent of the manufacturer whereas "electronic" transfers are eligible for Cryptographic Note sales through such outlets.

— It is not apparent why intangible should be permitted for "retail" sales directly by the manufacturer but not for sales through outlets independent of the manufacturer.

— The following revisions to 742.15(b)(1)(i,ii) are necessary to conform with ECCN 5A002.a.1:

(i) ~~56-bit encryption commodities, software and technology~~ "Symmetric algorithm". Encryption commodities, software and technology employing a key length up to and including 56-bits ~~with an asymmetric key exchange algorithm not exceeding 512 bits may be classified under ECCNs 5A992, 5D992 or 5E992~~

(ii) ~~Key management products~~ "Asymmetric algorithm". ~~Products which only provide key management with asymmetric exchange algorithms not exceeding 512 bits may be eligible for classification under ECCNs 5A992 or 5D992.~~ Where the security of the algorithm is based on any of the following:

(A) Factorization of integers in excess of 512 bits (e.g., RSA);

(B) Computation of discrete logarithms in a multiplicative group of a finite field of size greater than 512 bits (e.g., Diffie-Hellman over Z/pZ); or

(C) Discrete logarithms in a group other than mentioned in (B) in excess of 112 bits (e.g., Diffie-Hellman over an elliptic curve).

— 15 C.F.R. § 742.15(b)(1)(i), (ii), and (iii)(A) are redundant. License requirements are defined on the Commerce Control List and do not belong under the heading of Licensing Policy.

— 15 C.F.R. § 742.15(b)(1)(iii)(B) concerns grandfathering as well as license requirements rather than licensing policy and would logically be moved to 740.17(e)(2).

— The following revisions to § 748 Supplement 2 (c) are necessary to conform with the "must also be evaluated" wording (emphasis added) in § 774 Supplement 1 Category 4 Note 2:

> Digital computers, telecommunications, and related equipment. If your license application involves items controlled by both Category 4 and Category 5, your license application ~~must be submitted according to the principal function of the equipment~~ will be evaluated against the performance characteristics of both Categories. License applications involving digital computers ~~controlled by Category 4~~ must identify a Composite Theoretical Performance (CTP) in Block 22(b). ~~If the principal function is telecommunications, a CTP is not required. Computers, related equipment, or software performing telecommunication or local area network functions will be evaluated against the telecommunications performance characteristics of Category 5, while cryptographic, cryptoanalytic, certifiable multi-level security or certifiable user isolation functions, or systems that limit electromagnetic compatibility (EMC) will be evaluated against the information security performance characteristics of Category 5.~~

— The first 5D002 Note states: "Encryption . . . software is not accorded the same treatment under the EAR as other "software"; and for export licensing purposes, encryption software is treated under the EAR in the same manner as a commodity included in ECCN 5A002." However, in other parts of the EAR encryption software is treated as a subset of "software" and nowhere else in the EAR is 5D002 treated as a commodity included in 5A002.

— ECCNs 5A002, 5B002, 5D002, and 5E002 contain License Requirement Notes referring to 743.1 for reporting requirements for exports under License Exceptions. However, there are no such reporting requirements in 743.1, nor should there be, since these items are not included in Wassenaar Annex 1, which is the basis for 743.1 reporting requirements.

— The lists of items not controlled by ECCNs 5A002 and 5D002 irrationally appear in sections headed "Related Controls."

5.4.4 The Five-Step Licensing Analysis

Larry E. Christensen, the former Director of Regulatory Policy at BXA, has long advised exporters to utilize a decision tree for determining the appropriate License Exception or license for the export of software products and related technology.[135] In determining the licensing requirements for encryption software and technology under the new Commerce regime, U.S. exporters should use a similar approach and follow the steps outlined below, in descending order:

(1) Determine whether the software or technology qualifies for the "publicly available" encryption rules in License Exception TSU;[136] License Exception ENC;[137] or the Cryptography Note which describes software generally available to the public by being sold, without restriction, from stock at retail selling points by over-the-counter transactions, mail order transactions, electronic transactions, or telephone call transactions not containing a symmetric algorithm employing a key length exceeding 64 bits.[138] Be sure to notify BXA before exporting under License Exception TSU or the (a)(5)(i) portion of ENC and to await BXA review and classification before exporting under the (a)(5)(ii) or (a)(5)(iii) portions of ENC.

(2) If not, determine whether the software or technology is outside the scope of the new EI[139] controls for either of the following reasons:

- The items were either never controlled by the United States Munitions List (USML) or were transferred from the USML to the Commerce Control List (CCL) prior to November 15, 1996. Little if anything was never

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[135] See Larry E. Christensen, *Technology and Software Controls Under the Export Administration Regulations, in* Coping with U.S. Export Controls 437 (PLI Comm. Law & Practice Course Handbook Series No. A4-4544, Dec. 1998).

[136] 15 C.F.R. § 740.13(e).

[137] 15 C.F.R. § 740.17(a)(5).

[138] 15 C.F.R. § 774 Supplement 1 Category 5 Part 2 Note 3.a.

[139] As discussed in Section 5.4.2.1, *supra.* the EAR does not define "EI."

controlled by the USML. Nine items were formally transferred from the USML to the CCL on April 27, 1992 (see Table 5-1);

- The items were already under Commerce controls due to a prior case-by-case jurisdictional transfer. Only the parties directly involved in the affected cases are normally aware of such items, because case-by-case transfers are not recorded in any publicly available document.

(3) If not, determine whether the software or technology qualifies for License Exception.[140]

(4) If not, determine whether a license for exports of unlimited quantities should be sought under an Encryption Licensing Arrangement[141] to "strategic partners of a U.S. company."[142]

(5) For all other items, determine whether a license is available on a case-by-case basis.[143]

5.4.5 "Public Availability"

15 C.F.R. § 734 provides that encryption *software* (but not encryption *technology*) controlled for EI reasons under ECCN 5D002 remains subject to the EAR, even when publicly available (the "Public Domain EI-Software Carve-Out"). This includes encryption source code in electronic form or media (*e.g.*, a computer diskette or CD-ROM), but not such code in printed form.[144] The government reserves the option to impose export controls on scannable encryption source or object code in printed form.

Although other software in the public domain is not subject to the EAR, the government has argued that encryption software is controlled despite public availability because of its functional

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[140] This exception was modified in the December 31, 1998 rule. See discussion, at section 5.4.6 *infra* and accompanying note.

[141] See 15 C.F.R. § 742.15(b)(3).

[142] 15 C.F.R. § 772.

[143] A version of these comments has appeared previously in Rubinstein, *supra* note 4.

[144] 15 C.F.R. § 734.3(b)(2) and (3), note.

capacity, and not because of any informational value.[145] (See discussion of *Bernstein* in section 5.5 below). A statement of this position was added to the notes accompanying 5D002 by the January 14, 2000 revisions. However, the revised regulations also added a new Cryptography Note that releases encryption software from control under 5D002 if it is "generally available to the public by being sold, without restriction, from stock at retail points" by (1) over-the-counter transactions, (2) mail order transactions, (3) electronic transactions, or (4) telephone call transactions, provided that the items do not contain a "symmetric algorithm" employing a key length exceeding 64 bits.[146]

5.4.6 Not Subject to EI Controls

The nine items transferred from the USML to the CCL in 1992 plus portable or mobile radio telephones for civil use are explicitly excepted from control except to embargoed or terrorist countries (see Table 5-1). These exceptions apply even to sophisticated and strong encryption technology meeting their terms. For example, the strongest available encryption code for PIN protection may be exported without a license to any destination except embargoed or terrorist countries.

5.4.7 License Exception TSU

License Exception TSU permits the export to all destinations (except the embargoed countries) of unrestricted encryption source code not subject to an express agreement for payment of a licensing fee or royalty for commercial production or sale of any product developed using the source code. This license exception intends to account for the open source approach to software development. Although a review is not required under this license exception, exporters must notify BXA of the Internet location (*e.g.*, URL or Internet address) or provide a copy of the source code by the time of initial export. Exporters are not required to provide notification prior

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[145] Memorandum and Exec. Order No. 13,026, section 5.8.5.3, *supra* note 104. See also 15 C.F.R. § 742.15 and ECCN 5D002. BXA restated this position most recently in a letter to Phil Karn's attorney dated November 17, 1997; see *supra* note 135.

[146] 15 C.F.R. pt. 774, Category 5, Part 2, Note 3.

to subsequent exports and are not subject to the Internet download screening requirements.[147]

5.4.8 License Exception KMI

License Exception KMI (Key Management Infrastructure), contained in 15 C.F.R. § 740.8, permits the export of recovery encryption items of any key length that meet the criteria set forth in 15 C.F.R. § 742, Supplement 4. A technical review is required prior to export; classification requests must be submitted to BXA in accordance with 15 C.F.R. § 740.8(d)(1).[148] Exporters are not required to name or submit to BXA additional information on a key recovery agent prior to export.

5.4.9 License Exception ENC

License Exception ENC became effective December 31, 1998, and was radically revised on January 14, 2000. This exception extends favorable treatment to encryption commodities and software as follows:

- **Encryption Commodities, Software, and Technology for U.S. Subsidiaries.** Encryption items may be exported without a license or technical review to foreign subsidiaries of U.S. firms. Foreign nationals also may work on encryption in the United States for U.S. firms without an export license. All items produced under this license exception, however, will require a technical review.
- **Global Exports to Individuals, Commercial Firms, or Other Non-Government End-Users.** Encryption commodities, software, and components of any key length may be exported without a license to any non-government end-user in any country except embargoed or terrorist-supporting countries. Exports can be used for any activity, including communication with other firms, supply chains and customers. Section 740.17(a)(2) also subsumes previous sector-specific liberalizations for banks and financial institutions, health and medical end-users, and on-line merchants.

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[147] See 15 C.F.R. § 734.2(6)(9)(iii)

[148] See http://www.bxa.doc.gov/Encryption/KMI.htm.

- **Retail Encryption Commodities and Software.** Encryption commodities, software, and components which are reviewed and classified as "retail" may be exported without a license to any end-user except the embargoed or terrorist-supporting destinations. Retail encryption commodities and software may be exported to anyone, including Internet and telecommunication service providers, and may be used to provide any product or service. BXA will review functionality, sales volume, distribution methods to determine whether an encryption product qualifies as retail. Retail products also include finance-specific, 56-bit non-mass market products with a key exchange greater than 512 bits and up to 1024 bits, network-based applications and other products that are functionally equivalent to retail products.
- **Internet and Telecommunications Service Providers.** Encryption products may be exported without a license to Internet and telecommunications service providers for the provision of any service to any entity, including public key infrastructure services for the general public. A license is required, however, before non-retail products can be used to provide services specific to government end-users.
- **Global Exports of Commercial Encryption Source Code and Toolkits.** Encryption source code that is publicly available under § 734.3(b)(3) and is subject to an express agreement for the payment of a licensing fee or royalty for commercial production or sale of any product developed using the source code (*e.g.*, "community source code") may be exported to any end-user without a license or technical review. However, BXA must receive a copy of the source code or written notification of its Internet address prior to export. All other source code may be exported after a technical review to any non-government end-user. U.S. exporters may be required to provide general information on foreign products developed for commercial sale using commercial source code, but foreign products developed using U.S-origin source code or toolkits do not require a technical review.

5.4.10 Encryption Licensing Arrangement

The State Department historically allowed the export of products with encryption capabilities stronger than that provided by

40-bit RC2/RC4 ("strong encryption") to certain classes of end-users and end-uses. In particular, the State Department granted munitions licenses for strong encryption, on a case-by-case basis, to banks and financial institutions (whether U.S.-controlled or foreign) to secure financial data (whether in internal or interbanking communications) and to U.S.-controlled firms (*i.e.*, U.S. firms operating abroad, U.S.-controlled foreign firms, or foreign subsidiaries of U.S. firms) to secure their internal communications. Many of these end-uses and end-users are now covered by License Exception ENC.

15 C.F.R. § 742.15(b)(3) provides a substitute mechanism for exporting strong encryption to these broad classes of end-users via Encryption Licensing Arrangements (ELAs), which are available for all destinations except to the embargoed or terrorist-supporting countries.[149] ELAs are subject to case-by-case review and negotiation with the NSA and BXA (as well as the Justice Department and FBI). Although ELAs are more difficult to prepare than requests for classification or one-time reviews and impose burdensome reporting requirements on licensees (including information such as end-user name and address), they allow more flexible treatment of strong crypto exports to a favored group of end-users. According to BXA, certain items and classes of end users that "generally have been given favorable consideration in licensing review, subject to appropriate conditions" include:

(1) Certain 40-bit encryption software, which are not eligible for the mass market provisions of License Exception TSU (see 15 C.F.R. § 742, Supplement 6), and certain 40-bit encryption hardware, being exported to most end users;
(2) Certain 56-bit encryption commodities/software being exported to U.S. subsidiaries or to "financial institutions";
(3) Certain encryption commodities/software that implement the Secure Electronic Transactions (SET) protocol or other "financial-specific," products being exported to most end users to secure electronic commerce transactions/communications;
(4) Certain 128-bit encryption commodities/software that have a recovery feature, being exported to U.S. subsidiaries,

[149] See ELA instructions at http://www.bxa.doc.gov/Encryption/ela.htm.

"financial institutions," or to certain (commercial) foreign end users;

(5) Certain 128-bit encryption commodities/software for "home banking" purposes as long as the product is limited to bank/client communications/transactions and does not allow client-to-client communications/transactions;

(6) Certain 128-bit general purpose encryption commodities/software being exported to "financial institutions" for inter/intra banking, provided the manufacturer of the exported product has an approved KMI Commitment Plan;

(7) Certain 128-bit general-purpose encryption commodities/software being exported to U.S. subsidiaries provided the product allows for recovery of the plaintext.[150]

Virtually all of these items are now handled under the EAR, and many have been removed from license requirements, albeit in some instances subject to conditions. In the future, exporters will rely on ELAs mainly to seek approval for export of the items that continue to require a license.

5.4.11 Technology

A case-by-case review of applications for export is required for export of (1) encryption items not authorized under an ELA; and (2) encryption technology.[151] Determining the scope of this licensing requirement seems straightforward but actually requires several detours. First, ECCN 5E002 covers "Technology" according to the General Technology Note[152] for the "Development," "Production," or "Use" of equipment controlled by 5A002 or 5B002 or software controlled by 5D002. The EAR define "Technology" as "specific information necessary for the 'development,' 'production,' or 'use' of a product. The information takes the form of 'technical data' or 'technical assistance.' " The definitions further state that "technical data" may take various forms such as "blueprints, plans, diagrams,

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[150] BXA has prepared a fact sheet on "Licensing Guidance" for commercial encryption export controls which is available on-line at http://www.bxa.doc.gov/encryption/guidance.htm. "Licensing Guidance" for commercial encryption export controls.

[151] BXA has posted on its Web page guidance on "Applying for an Individual License" http://www.bxa.doc.gov/Encryption/il.htm.

[152] 15 C.F.R. § 774, Supplement 2.

models, formulae, tables, engineering designs and specifications, manuals and instructions written or recorded on other media" and that "technical assistance" may take forms such as "instruction, skills training, working knowledge, [or] consulting services."[153] Thus, ECCN 5E002 would seem to apply to *all* EI-controlled encryption technology. But this is not the case. As a result of heightened First Amendment concerns due to the *Bernstein*[154] case, the Public Domain EI-Software Carve-Out extends to encryption software,[155] but not to encryption technology.

The regulations permit the export of publicly available encryption technology, but as a practical matter this is true only to the extent that technology means "technical data" (such as printed material). 15 C.F.R. § 744.9(a) prohibits U.S. persons from providing "technical assistance" in the development or manufacture abroad of encryption commodities and software controlled for EI reasons under ECCN 5A002 or 5D002. This provision represents BXA's effort to preserve the State Department restrictions on U.S. persons providing "defense services"[156] to foreign nationals and, pursuant to 15 C.F.R. § 732.2(b)(1), this restriction seems to apply irrespective of whether the "technical assistance" is publicly available. However, no license is needed to furnish books or other printed materials that are exempt from export controls for constitutional reasons (technical data). Assisting foreign persons with encryption development or manufacture requires a license (technical assistance), however, unless the technology is being furnished to foreign employees in the United States (not from the embargoed or terrorist-supporting destinations) under License Exception ENC.

5.4.12 Deemed Export

Under the "deemed export" rule (discussed in section 1.4 above), the release of technology or source code to foreign nationals *within* the U.S. is deemed an export to the foreign national's

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[153] These definitions are found at 15 C.F.R. § 772.

[154] Bernstein v. Department of State, 922 F. Supp. 1426 (N.D. Cal. 1996); see text accompanying notes 177–180.

[155] See section 5.4.2, *supra*.

[156] 22 C.F.R. § 120.9(1); see generally Rubinstein, *supra* note 4.

home country.[157] Encryption *software* is not subject to the deemed export rule by the exclusion of encryption software subject to EI controls from the deemed export rule in 15 C.F.R. § 734.2(b)(2). Encryption *technology* is subject to the deemed export rule because the 15 C.F.R. § 734.2(b)(2) exclusion applies only to software and not also to technology. However, under License Exception ENC, U.S. firms may transfer technology to their foreign employees for internal company use (except to nationals or embargoed or terrorist-supporting destinations), and publicly available technology may be transferred to any foreign person, because the Public Domain EI-Software Carve-Out applies to encryption software only and not to encryption technology.

Publicly available encryption technology is not subject to EI controls (though companies should be alert to the prohibition against technical assistance in 15 C.F.R. § 744.9(a), which applies even if the applicable technology is in the public domain). Therefore, notwithstanding the deemed export rule, a U.S. employer may disclose to its foreign employees encryption source code, object code, and publicly available technology, and, except to nationals of embargoed or terrorist-supporting destinations, proprietary technology. In some instances, it is difficult to draw a sharp line between encryption source code or object code and proprietary encryption technology.[158]

5.4.13 Internet Posting

15 C.F.R. § 734.2(b)(9) defines "export" of encryption source code and object code software to include transfers of code controlled for EI reasons to persons outside the U.S., except Canada, (via bulletin board, FTP or Web site downloads, or wire, cable, or other comparable communications facilities), unless "adequate

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[157] See 15 C.F.R. § 779A.1(b)(1)(ii) as amended by 59 Fed. Reg. 13,449 (1994); now 15 C.F.R. § 734.2(b)(2)(ii). 15 C.F.R. § 734.2(b)(3) defines "release" to include visual inspection by foreign nationals of U.S.-origin equipment and facilities; oral exchange of information in the U.S. or abroad; and the application to situations abroad of personal knowledge or technical experience acquired in the U.S.

[158] BXA has published a fact sheet with information on deemed export license applications, which is available in .pdf format at http://www/bxa.doc.gov/factsheets/pdf/foreignationals.pdf.

precautions" were taken to prevent unauthorized transfers.[159] The EAR allow operators of Web servers or other communication facilities to avoid liability by ensuring that the facility from which the software is available controls access to and transfers of such software through the following measures:

- The access control system, either through automated means or human intervention, checks the address of every system requesting or receiving a transfer and verifies that such systems are located within the United States.
- The access control system provides every requesting or receiving party with notice that the transfer includes or would include cryptographic software subject to export controls under the Export Administration Act, and that anyone receiving such a transfer cannot export the software without a license.
- Every party requesting or receiving a transfer of such software must acknowledge affirmatively that he or she understands that the cryptographic software is subject to export controls under the Export Administration Act and that anyone receiving the transfer cannot export the software without a license. BXA will consider acknowledgments in electronic form provided that they are adequate to assure legal undertakings similar to written acknowledgments.[160]
- Exempted from the Internet download screening requirements, however, are unrestricted source code under § 740.13(e), commercial encryption source code under § 740.17(a)(5)(i), and retail products under § 740.17(a)(3).

5.5 FEDERAL COURT CHALLENGES

The U.S. Government regulation of encryption exports also has been challenged in the federal courts. Plaintiffs have raised arguments based on the First and Fifth Amendments of the U.S. Constitution and the Administrative Procedure Act (APA).[161] The

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[159] 15 C.F.R. § 734.2(b)(9)(ii).

[160] *Id.*

[161] 5 U.S.C. § 706(2)(A).

courts in *Karn v. United States Department of State*,[162] *Junger v. Daley*,[163] and *Bernstein v. United States Department of Justice*[164] have provided conflicting precedents, however, and have been unable to resolve the issue of constitutionality. *Karn* arose prior to the Executive Order, as did *Bernstein*, while *Junger* arose afterwards. *Bernstein* straddled the Executive Order, requiring the court there to consider the issues under both State and Commerce Department rules.

In *Karn*, the U.S. District Court for the District of Columbia considered whether the State Department's regulation of a computer diskette containing source code for encryption algorithms violated the APA and the First and Fifth Amendments.[165] Karn, an exporter, submitted the diskette to the State Department's Office of Defense Trade Controls (ODTC) for a commodity jurisdiction determination. ODTC determined that the diskette was a defense article subject to the International Traffic in Arms Regulations (ITAR) even though it determined a week earlier that a book containing the same source code was not controlled under the ITAR.

Karn challenged the regulation in federal court after the State Department rejected his administrative appeals.[166] In granting the government's summary judgment motion, the court dismissed Karn's APA claims, holding that judicial review was barred by the express language of Arms Export Control Act (AECA), under which the ITAR was promulgated. The purpose of the AECA was to permit the Executive Branch to control the export of certain items for national security and foreign policy reasons.[167] The court also granted summary judgment to the government on Karn's First Amendment claims. The court assumed that the right of free speech extended to the source code and to the comments on the plaintiff's diskette. The court found that the government's rationale for regulation was to deter foreign intelligence sources from encoding their communications, which was content-neutral. The court upheld the regulation under the *O'Brien* test since the

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[162] 925 F. Supp. 1 (D.D.C. 1996).
[163] 8 F. Supp. 2d 708 (N.D. Ohio 1998).
[164] 176 F.3d 1132 (9th Cir. 1999).
[165] See 925 F. Supp. at 3.
[166] See *id.* at 3–4.
[167] See *id.* at 8.

regulation was narrowly tailored to further an important or substantial government interest.[168] The court also rejected Karn's claim that the regulation was a "system of vague prior restraints" and a deprivation of substantive due process in violation of the First and Fifth Amendments, respectively.[169]

In *Junger*, the U.S. District Court for the Northern District of Ohio also considered whether the Commerce Department's regulation of encryption software violated the First Amendment. Junger, a law professor, wrote several encryption programs that he wanted to post on his web site.[170] Junger submitted commodity classification applications to the Commerce Department to determine whether the software and a textbook containing the encryption code were restricted from export. BXA determined that four of the five software programs required export licenses, but that the printed book did not.

Junger challenged the government's regulation of encryption exports in federal court and sought injunctive and declaratory relief from the government's enforcement of export controls on encryption software. Junger argued that the EAR violated First Amendment rights. The government denied that the First Amendment was implicated, arguing that the regulations restricted distribution but not ideas.[171]

The court agreed with the government.[172] In doing so, it distinguished between expressive and functional software, and reasoned that regulation of the former receives strict scrutiny while regulation of the latter receives only intermediate scrutiny. The court found the encryption source code to be "inherently functional" since it was "designed to enable a computer to do a designated task" and because its users "look to the performance of tasks with scant concern for the methods or the software language used to control such methods."[173]

The court also held that the encryption export licensing scheme was not an unconstitutional prior restraint. The court reasoned here that the act of exporting is not sufficiently expressive, and

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[168] See *id.* at 12.

[169] See *id.* at 13–14.

[170] Internet posting is deemed an export under 15 C.F.R. § 734.2(b)(9).

[171] See *Junger*, 8 F. Supp. at 711.

[172] See *id.* at 712.

[173] *Id.* at 716.

that academic discussion and printed descriptions of software are not restricted under the EAR.[174] The court also rejected Junger's arguments that the regulations should be invalidated for vagueness and overbreadth.[175] Accordingly, the court granted the government's motion for summary judgment and denied Junger's motion for summary judgment.[176]

Bernstein is at the most advanced stage of the three cases, having been heard and decided on the merits by the U.S. Court of Appeals for the Ninth Circuit. The trial court and the appellate panel also considered whether government regulation over encryption exports constituted an impermissible prior restraint.[177] Bernstein, a computer science instructor at UC Berkeley, developed an encryption method known as "Snuffle." Bernstein asked the State Department for permission to present his work on Snuffle within the academic and scientific communities. The State Department informed Bernstein that Snuffle was subject to the ITAR, and that a license would be required prior to export.

Bernstein challenged the constitutionality of the ITAR in the U.S. District Court for the Northern District of California. The court found source code to be protected speech under the First Amendment ("*Bernstein I*")[178] and granted summary judgment to Bernstein ("*Bernstein II*").[179] Bernstein amended his complaint after the Executive Order transferred regulatory jurisdiction of encryption items to the Commerce Department. The court again granted summary judgment to Bernstein, following the rationale of its earlier opinions.

The Ninth Circuit affirmed the District Court's conclusion that encryption source code was expressive for First Amendment purposes and protected against prior restraint. The Ninth Circuit reasoned that "cryptographers use source code to express their scientific ideas in much the same way that mathematicians use equations or economists use graphs." The Ninth Circuit rejected the argument that the availability of an alternate means of

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[174] See *id.* at 718–19.

[175] See *id.* at 719.

[176] See *id.* at 723–24.

[177] See *Bernstein*, 176 F.3d 1132 (9th Cir. 1999).

[178] See Bernstein v. Department of State, 922 F. Supp. 1426 (N.D. Cal. 1996) ("Bernstein I").

[179] See Bernstein v. Department of State, 945 F. Supp. 1279 (N.D. Cal. 1996) ("Bernstein II").

expression could justify governmental restrictions, applying the test from *Freedman v. Maryland* to determine whether the licensing scheme was valid.[180] The court found that scientific expression was impermissibly chilled by the EAR, which "allow[ed] the government to restrain free speech indefinitely with no clear criteria for review" and, accordingly, held that the challenged regulations were unconstitutional.

Following the ruling, the Ninth Circuit granted the government's request for a rehearing *en banc* and withdrew the three-judge panel's opinion.[181] However, upon the publication of the January 14, 2000, regulation, the Ninth Circuit decided instead to remand case to the original appellate panel to review the case in light of the January 14, 2000, regulation. Bernstein also requested an advisory opinion from the Commerce Department to clarify the regulations.[182] In BXA's letter of response, the agency rearticulated its belief that the regulations have always been constitutional and that the distinction between source code in printed material, which is not subject to the EAR, and source code in electronic form or media, which is subject to the EAR, is based on the executability of the software.[183]

5.6 THE FUTURE

At this writing, there are many variables in play: litigation, rule changes, and legislation are all part of the picture. It would be

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[180] See *Bernstein*, 176 F.2d 1132 (citing Freedman v. Maryland, 380 U.S. 51 (1965)). In *Freedman*, the Supreme Court established three factors for determining the validity of licensing schemes that impose a prior restraint on speech: (1) any restraint must be for a specified brief period of time; (2) there must be expeditious judicial review; and (3) the censor must bear the burden of going to court to suppress the speech in question and must bear the burden of proof.

[181] See Bernstein v. United States Department of Justice, 192 F.3d 1308 (9th Cir. 1999).

[182] See Letter from Cindy A. Cohn, McGlashan & Sarrail, Professional Corporation, lead counsel in *Bernstein*, to James Lewis, Director, Office of Strategic Trade and Foreign Policy Controls, Bureau of Export Administration, U.S. Department of Commerce (January 16, 2000) (available at http://www.eff.org/bernstein/Legal/20000116_bernstein_bxa_questions.html).

[183] See Letter from James Lewis, Director, Office of Strategic Trade and Foreign Policy Controls, Bureau of Export Administration, U.S. Department of Commerce, to Cindy A. Cohn, McGlashan & Sarrail, Professional Corporation, lead counsel in *Bernstein* (February 17, 2000) (available at http://www.eff.org/bernstein/Legal/20000218_bxa_export_advisory.html).

foolhardy to dwell at length on what may happen to U.S. encryption export policy. Legislation under consideration in 1999 — the SAFE (Security and Freedom through Encryption Act) bill (H.R. 850), co-sponsored by Representatives Bob Goodlatte and Zoe Lofgren, and the PROTECT (Promote Reliable On-Line Transactions to Encourage Commerce and Trade) bill (S. 798), introduced by Senator John McCain, probably influenced the scope of the January 14, 2000, regulation. New legislative initiatives cannot be ruled out. Finally, the *Bernstein* case undoubtedly will continue to influence control policy, irrespective of its final outcome.

TABLE 5-1
Software and Technology Outside the Scope of the New EI Controls

On April 27, 1992, export control jurisdiction over the following cryptographic equipment and software was transferred from State to Commerce (see 57 Fed. Reg. 15,227, 15,228 (1992)):

1. Restricted to decryption functions specifically designed to allow the execution of copy protected software, provided the decryption functions are not user-accessible.
2. Specifically designed, developed or modified for use in machines for banking or money transactions, and restricted to use only in such transactions. Machines for banking or money transactions include automatic teller machines, self-service statement printers, point of sale terminals or equipment for the encryption of interbanking transactions.
3. Employing only analog techniques to provide the cryptographic processing that ensures information security in the following applications:
    a. Fixed (defined below) band scrambling not exceeding 8 bands and in which the transpositions change not more frequently than once every second;
    b. Fixed (defined below) band scrambling exceeding 8 bands and in which the transpositions change not more frequently than once every ten seconds;
    c. Fixed (defined below) frequency inversion and in which the transpositions change not more frequently than once every second;
    d. Facsimile equipment;
    e. Restricted audience broadcast equipment;
    f. Civil television equipment.

Note: Special Definition. For purposes of this subparagraph, "fixed" means that the coding or compression algorithm cannot accept externally supplied parameters (*e.g.*, cryptographic or key variables) and cannot be modified by the user.

4. Personalized smart cards using cryptography restricted for use only in equipment or systems exempted from the controls of the USML (USML control exemptions paralleled what was transferred to the CCL at that time).
5. Limited to access control, such as automatic teller machines, self-service statement printers or point of sale terminals, which protects password or personal identification numbers (PIN) or similar data to prevent unauthorized access to facilities but does not allow for encryption of files or text, except as directly related to the password or PIN protection.

TABLE 5-1 (CONTINUED)

6. Limited to data authentication which calculates a Message Authentication Code (MAC) or similar result to ensure no alteration of text has taken place, or to authenticate users, but does not allow for encryption of data, text or other media other than that needed for the authentication;
7. Restricted to fixed data compression or coding techniques.
8. Limited to receiving for radio broadcast, pay television or similar restricted audience television of the consumer type, without digital encryption and where digital decryption is limited to the video, audio or management functions.
9. Software designed or modified to protect against malicious computer damage, *e.g.*, viruses.

The 1992 transfers are explicitly removed from control except to embargoed or terrorist countries by the Related Controls paragraphs in 5A002 and 5D002; the clarifications and interpretations in the January 14, 2000 Supplementary Information; the January 14, 2000 deletion of 5A002.a.3; and the deletion of an old sub-item for software to protect against viruses.

TABLE 5-2
Encryption Licensing Chart

This chart compares licensing mechanisms for specified encryption items under the encryption regulation published on January 14, 2000, with the licensing mechanisms available for these items prior to that date. The chart is **not** all-inclusive and is only meant as general guidance for exporters. Please refer to the Export Administration Regulations, in particular Part 740 and Section 742.15, for other provisions, criteria and restrictions for these Licensing mechanisms.

Product	*Previous Licensing Mecha-nism*	*1/14/00 Licensing Mecha-nism*	*Technical Review*	*Reporting*
Mass Market Software up to 56-bits or equivalent with up to 1024 key exchange	TSU	NLR	Yes[1,2]	No
Mass Market Hardware up to 56-bits or equivalent with up to 1024 key exchange	ENC	NLR	Yes[1,2]	No
Mass Market Hardware and Software up to 64-bits or equivalent	IL/ELA	NLR	Yes[1,2]	No
Non-Mass Market Hardware and Software up to 56-bits or equivalent with 512 key exchange	ENC	NLR	Yes[1,2]	No
Non-Mass Market Hardware and Software up to 56-bits with key exchange greater than 512 bits and up to 1024 bits	ENC	ENC	Yes[1,2]	No
Components (chips, toolkits) up to 56-bits	IL/ELA	NLR	Yes[1]	No

TABLE 5-2 (CONTINUED)

Product	*Previous Licensing Mechanism*	*1/14/00 Licensing Mechanism*	*Technical Review*	*Reporting*
Retail products	IL/ELA/L.E.	ENC	Yes	Yes, except to individuals
Components (chips, application specific toolkits) exceeding 56-bits	IL/ELA	ENC	Yes[1,3]	Yes
General Purpose Toolkits	IL/ELA	ENC	Yes[1,3]	Yes
Source Code (publicly available, unrestricted)	IL/ELA	TSU	No[3,4]	No
Source Code (publicly available with restrictions)	IL/ELA	ENC	No[3,4]	Yes
Source Code (other)	IL/ELA	ENC	Yes[1,3]	Yes

Notes:

1. *Grandfathered, if previously reviewed under a license or license exception (see 740.17(e)(2))*
2. *If previously reviewed, key length increases require notification only (see 742.15(b)(1)(iii)(B))*
3. *No review of foreign products(s)*
4. *BXA Notification at time of export is required*

ELA-Encryption Licensing Arrangement
IL- Individual License
NLR-No License Required (5A992/5D992)

*This chart appears on the BXA Web page at http://www.bxa.doc.gov/Encryption/licchart.htm (visited March 13, 2000).

TABLE 5-3
Export of Encryption Technology (5E002)

This chart provides additional guidance pertaining to the transfers of encryption technology controlled under ECCN 5E002, and is not all inclusive and is only meant as general guidance for exporters. The chart includes guidance on the release of 5E002 encryption technology to foreign nationals under the "deemed export" rule found at §734.2(b)(2) of the Export Administration Regulations (EAR). The inclusion of "contractors" and "consultants" within the meaning of "employees", as that term is used in the relevant EAR provisions, is intended to address export control issues only and does not have any bearing on labor or employment matters. Please refer to the EAR, in particular §740.17, for specific details, and Part 772 for the definition of a U.S. subsidiary. Also, exports or transfers of encryption technology to foreign nationals from Cuba, Iran, Iraq, Libya, North Korea, Sudan or Syria is not permitted without written authorization from the U.S. government.

Exporter	*End-Users*	*Licensing Mechanism*	*Technical Review*
U.S. Company	U.S. Company's foreign subsidiary	ENC	No
U.S. Company	Foreign employees, including Contractors and Consultants[1], in the U.S.	ENC	No
U.S. Company (owned by foreign parent)	Foreign employees, including Contractors and Consultants[1] of a U.S. company, in the U.S.	ENC	No
U.S. Company (U.S. or foreign parent)	Foreign Entity	ELA/IL	Yes
U.S. Company (owned by foreign parent)	Foreign Parent	ELA/IL	Yes
U.S. Company (owned by foreign parent)	Foreign employees of foreign parent working in the U.S.	ELA/IL	Yes

ELA-Encryption Licensing Arrangement
ENC-License Exception ENC
IL-Individual License

1. Consistent with the EAR provisions, it is BXA's intent to include self-employed natural person (not a juridical person, e.g., not a company) within this end-user category.

*This chart appears on the BXA Web page at http://www.bxa.doc.gov/Encryption/tech.htm (visited March 13, 2000).

Chapter 6:
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CHAPTER 6

ADMINISTRATION OF COMMERCE BXA CONTROLS

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6.1 INTRODUCTION

Other chapters discuss the content and enforcement of Department of Commerce export controls. This Chapter concerns their administration.

Sections on government organization and organization of the Commerce Export Administration Regulations (EAR) are followed by sections on the responsibilities and opportunities of private parties, principally the exporter.

6.2 GOVERNMENT ORGANIZATION

The Department of Commerce is the agency with prime responsibility for EAR export controls, but other agencies are also involved.

6.2.1 Commerce

The senior official under the Secretary of Commerce responsible for export controls is the Under Secretary for Export Administration. Under the Under Secretary are two Assistant Secretaries: one for enforcement and one for administration.

The Assistant Secretary for Export Enforcement supervises not only an Office of Export Enforcement (OEE) but also an Office of Export Intelligence and an Office of Anti-Boycott Compliance (OAC). Chapter 7 discusses anti-boycott activities and Chapter 8 discusses enforcement.

The Assistant Secretary for Export Administration supervises the Bureau of Export Administration (BXA), which consists of the following Offices and Divisions:

- Office of Chemical and Biological Controls and Treaty Compliance
  - —Short Supply
  - —Chemical/Biological Controls Division
  - —Treaty Compliance Division
- Office of Strategic Trade and Foreign Policy Controls
  - —Strategic Trade Division
  - —Foreign Policy Controls Division
- Office of Nuclear and Missile Technology Controls

- Office of Exporter Services
- Office of Strategic Industries and Economic Security —Economic Analysis Division

Separate offices for Chemical and Biological Controls, Strategic Trade and Foreign Policy Controls, and Nuclear and Missile Technology Controls parallel separate organizational units in other agencies for these topics. However, this organization means that, for many items controlled for more than one reason, an exporter cannot obtain definitive information concerning license requirements from the working level in one organization in Commerce. For example, for numerous Commerce Export Control Classification Numbers (ECCNs) controlled in whole or in part for both national security reasons, *i.e.*, Wassenaar items, and missile technology and/or nuclear proliferation reasons, *i.e.*, Missile Technology Control Regime (MTCR) or Nuclear Supplier Group (NSG) items, working level responsibility is divided between the Strategic Trade Division and the Office of Nuclear and Missile Technology.

The Department of Commerce also maintains District Offices in major industrial and commercial centers throughout the United States. Export control responsibilities of District Offices are as follows:

- Get priority action for processing an export license application in an emergency.
- Explain the regulations.
- Help with clearance of shipments.
- Provide export control forms and other printed materials.
- Offer guidance and assistance concerning export transactions.

6.2.2 Other Agencies

Other agencies administer various export controls that are not administered by Commerce.[1]

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[1] These are listed as "not subject to the EAR" in 15 C.F.R. § 734.3(b)(1). The list of Other U.S. Government Agencies with Export Control Responsibilities in 15 C.F.R. § 730 Supplement 3 includes many that are not mentioned in § 734.3(b)(1). Moreover, Environmental Protection Agency (EPA) and Consumer Product Safety

Commerce seldom advises other agencies how to administer controls under their jurisdiction. However, other agencies play a major role in advising Commerce in the administration of Commerce controls.

The Departments of Defense, State, and Energy have the opportunity to review any export license applications sent to Commerce that those Departments wish to see.[2] Defense has chosen to review all license applications and State reviews most "foreign policy" and "national security" cases.[3] Energy reviews cases for items marked NP (for nuclear proliferation) as reason for control except to NSG members and to most signers of the Nuclear Non-Proliferation Treaty.

Other agencies must respond to Commerce referrals within 30 days. Additional delays may be experienced for cases escalated to higher levels for resolution of inter-agency differences or for special cases for which adherence to this deadline has proven to be impracticable.

A working level Operating Committee (OC) considers cases not resolved more informally. An Advisory Committee on Export Policy at the Assistant Secretary level (ACEP) or at the Deputy Assistant Secretary level (Sub-ACEP) considers appeals from the OC. A cabinet level Export Administration Review Board (EARB) occasionally meets. In addition, a Subgroup on Nuclear Export Coordination (SNEC) considers Nuclear Referral List cases (*i.e.*, items marked NP on the Commerce Control List) and an Ad Hoc Group on Non-Proliferation considers cases not resolved in the SNEC.

An exporter should seek information on the status of a license application or other request first from Commerce.[4] If Commerce

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Commission (CPSC) controls discussed in Chapter 9 are not even included in 15 C.F.R. § 730 Supplement 3. Thus, pursuant to the EAR, Commerce literally has concurrent jurisdiction with several other agencies. However, Commerce is not known to have attempted to exercise jurisdiction in such cases.

[2] Exec. Order No. 12,981, 60 Fed. Reg. 629 (Dec. 6, 1995). The Executive Order also gave the Arms Control and Disarmament Agency (ACDA) such an opportunity; but ACDA ceased to be an independent agency on April 1, 1999, its functions having been transferred to the State Department.

[3] EAA sections 6 and 5 authorize controls for foreign policy and national security reasons, respectively.

[4] 15 C.F.R. § 750.5 gives information on how to use BXA's System for Tracking Export License Applications (STELA), which may also be used for tracking classification requests.

responds that it is waiting to hear from another agency, the exporter can then seek from that agency the status of its review.[5]

Pursuant to the Export Administration Act (EAA), an exporter may request the opportunity to review for accuracy any documentation referred to another agency.[6]

6.3 EXPORT ADMINISTRATION REGULATIONS STRUCTURE

The EAR[7] begins with an introduction, consisting of part 730 General Information and part 732 Steps for Using the EAR. Section 730.10 states:

> The general information in this part .... is selective, incomplete, and not expressed with regulatory precision. The controlling language is the language of succeeding parts of the EAR .... You should not take any action based solely on what you read in this part.

Part 732 contains no similar disclaimer. Therefore, at least theoretically, an exporter could be charged with violating the Steps in part 732, even though part 732, like part 730, is not, in fact, expressed with regulatory precision.

The concept of "Steps" is to alleviate, rather than exacerbate, the regulatory burden. However, part 732 creates much confusion, because there are numerous instances in which it differs from succeeding parts.[8] The exporter is, therefore, advised to rely only on the succeeding parts and to use part 732, as well as part 730, if at all, only as a general introduction, recognizing that it is both incomplete and unreliable.

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[5] Defense provides a computerized service for this purpose called ELISA (for Export License Information System Automated), which can be accessed by a computer with a modem at 703-604-5902. The telephone number for the licensing branch at Defense is 703-604-5704.

[6] EAA § 10(d)(2).

[7] 15 C.F.R. §§ 730-744.

[8] Differences are identified in Appendix 6-1.

6.3.1 What Commerce Controls

The next seven parts of the EAR, 734 through 746, plus 754 (short supply), 768 (foreign availability), 770 (interpretations), 774 (Commerce Control List), and the portion of 772 definitions related to the foregoing, describe what Commerce controls and what Commerce does not control.[9] There are also problems of inconsistencies in these parts.[10] However, unlike part 732, the exporter cannot ignore discrepancies among these parts or between them and other parts. This is because they constitute the regulatory basis for control.

When confronted with the dilemma as to which of two inconsistent regulations to follow, generally one should comply with the more restrictive one.[11] Another informal rule is to follow the more specific regulation. Sometimes what is more specific is less restrictive, as when a general prohibition is followed by a specific exception. In such an instance, it would be reasonable to follow the less restrictive regulation, provided all of its conditions were met.

6.3.1.1 Subject to the EAR

Part 734 defines what is, and what is not, "subject to the EAR." However, part 734 is incomplete in this regard.[12] There are several fundamental definitions in part 734 that are not repeated elsewhere. These include definitions of "export," and "reexport,"[13] "publicly available,"[14], and *de minimis*.[15] The part 772 list of definitions has less detailed definitions of "export," "reexport" and "publicly available technology and software," which make reference to part 734.[16]

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[9] These parts are analyzed in Chapter 4.

[10] Inconsistencies are identified in Chapter 4 and in Appendix 6-1.

[11] BXA informally advises that compliance with the more restrictive of two conflicting regulations is required; but the EAR does not formally so state.

[12] Examples of incompleteness are identified in Chapter 4.

[13] 15 C.F.R. § 734.2(b).

[14] 15 C.F.R. §§ 734.3(b)(2, 3) and 734.7 to 734.11.

[15] 15 C.F.R. §§ 734.3(b)(4), 734.4, and 734 Supplement 2.

[16] The reference to part 732 in the part 772 definition of "publicly available information" should probably be changed to part 734.

6.3.1.2 Ten General Prohibitions

Part 736 is in the form of ten General Prohibitions. Part 736, while not complete, covers most requirements.[17]

6.3.1.3 Country Chart

Part 738 shows license requirements for every country in the world. The list of countries in the Country Chart in part 738 is reasonably complete. However, other parts of the regulations include other destinations.[18] Moreover, in years past, Commerce had informally interpreted the additional destinations to be independent for export control purposes.[19] These destinations are now given the same license treatment as the parent country of which they are a territory, possession, or department.[20]

6.3.2 Remainder

Parts 748, 750, 752, 756, 758, 762, and the portion of 772 definitions related to the foregoing concern the administration of Commerce controls. They cover submission of license applications, processing of license applications, a special comprehensive license, appeals, export clearance, and recordkeeping. Chapter 6 analyzes this portion of the EAR.[21]

6.4 EXPORT PREREQUISITES

Before applying for an export license (or deciding to export without a license) it is necessary to determine who are the responsible

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[17] Chapter 4 identifies requirements left out of part 736. Part 736 refines still further the part 734 definition of "reexport" for purposes of General Prohibition One, by limiting it to U.S.-origin items. 15 C.F.R. § 736.2(b)(1).

[18] Bermuda, French Guiana, Greenland, Miquelon Island, Netherlands Antilles, and St. Pierre Island are listed in 15 C.F.R. § 748.9(a)(1). The § 748.9(a)(1) list also includes French West Indies and Leeward and Windward Islands, which are not referred to in that way in part 738, although the individual islands in those groups are named in part 738.

[19] These were British Indian Ocean Territories, British Virgin Islands, Caymans, Faeroe Islands, Gibraltar, Guadeloupe, Jan Mayen, Martinique, Montserrat, Reunion, St. Denis, Svalbard, Turks and Caicos.

[20] 15 C.F.R. § 738.3(b).

[21] Part 760 concerns restrictive trade practices or boycotts, which is discussed in Chapter 7. Parts 764 and 766 concern enforcement, which is discussed in Chapter 8.

parties for export control purposes and what are the responsibilities of those parties. It is also necessary to determine the export control classification of the item to be exported, to make sure that marketing and administrative personnel understand the applicable regulations, to decide whether an advisory opinion would be desirable, and to confirm that the prospective sale constitutes an "order" sufficiently advanced to support a license application.

6.4.1 Responsible Parties

There are many parties who have responsibilities under the EAR. The exporter is not the only person with responsibilities. Freight forwarders, carriers, and domestic sellers also must comply.

6.4.1.1 Exporter

The regulations define the license "applicant" as

> That person who, as the principal party in interest in the transaction, has the power and responsibility for determining and controlling the sending of the item out of the country and is thus, in reality, the exporter.[22]

The definition of "U.S. exporter" uses substantially the same wording as the definition of "applicant."

A person anticipating becoming a "U.S. exporter" should plan ahead by determining:

- Who should have export control responsibilities within the exporter's organization.
- The control status (classification) of items considered for export.
- The need for internal controls.
- How to provide liability protection in the event a needed license is not obtained or is delayed.
- Whether an advisory opinion would be desirable.
- Whether the prerequisite "order" as a condition for applying for a license has been obtained.

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[22] 15 C.F.R. § 772.

Exporter responsibilities include:

- Becoming familiar with the relevant laws and regulations.
- Establishing a compliance program.
- Determining whether the anticipated recipient of the export is a denied party.
- Determining whether or not a license is required for the item, the destination, the end-use, or the end-user.
- Complying with the conditions of an exception from a license requirement if use of one is contemplated.
- Applying for a license if needed.
- Complying with the terms of the license and other relevant rules and regulations.

6.4.1.2 Freight Forwarder

Freight forwarding is identified as a type of support for which a license is required if a U.S. person knows that it would facilitate a nuclear, missile, or CBW transaction not authorized as required.[23]

Otherwise, the forwarder, unless also the "U.S. exporter," is usually not legally a party to the transaction, if you consider the transaction to be the export sale itself. If the forwarding agent is appointed at the suggestion of a foreign buyer, the seller may insist that the agent apply for the export license.[24] Even if not the applicant, the forwarder does have legal obligations to both the exporter and the U.S. Government, separate and apart from the main transaction. The forwarder is deemed to be the agent of the exporter.[25] The forwarder is authorized to perform for the exporter the administrative services that facilitate the export of the items described in the Shipper's Export Declaration.

A freight forwarder who violates the EAR is legally liable, even if not a party to the transaction itself. Under the EAA, all persons are liable who cause, aid, or abet a violation; solicit, attempt, or conspire to violate the EAA; act with knowledge of a violation;

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[23] 15 C.F.R. § 744.6(a)(1)(ii).
[24] 15 C.F.R. § 758.1(b)(2).
[25] 15 C.F.R. § 758.1(b)(1).

or misrepresent or conceal any salient facts regarding an export transaction. The submission of any false or misleading information or the concealment of material facts, whether in connection with license applications, Shipper's Export Declarations, or other documents, is explicitly a violation.[26]

6.4.1.3 Carrier

A carrier who violates the EAR in the course of carrying out or deviating from the exporter's directions is also liable. In addition, a carrier is enjoined from issuing a bill of lading or airwaybill providing for delivery of cargo at any foreign port not in the country of the ultimate consignee or of the intermediate consignee named in the Shipper's Export Declaration.[27] Moreover, without specific authorization from BXA, a carrier may not deliver cargo to any other country at the request or option of the shipper, consignor, exporter, purchaser, or ultimate consignee, or their agents.[28] Similar rules apply to the issuance of bills of lading providing for delivery at an optional port that is not the country of ultimate destination listed on the license or the Shipper's Export Declaration.[29]

The carrier may be exonerated for unloading cargo in unauthorized ports for reasons beyond its control, but the carrier must report such situations immediately.[30] Carriers also have duties to return questionable shipments to the United States.[31]

The requirement for a license to support a nuclear, missile, or CBW transaction not authorized as required explicitly includes transportation as well as freight forwarding.[32]

6.4.1.4 Seller

A domestic seller who violates the EAR is also liable. However, in most circumstances, a seller who delivers items in the United States to a foreign buyer or to the forwarder of a foreign buyer is

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[26] 15 C.F.R. § 764.2.
[27] 15 C.F.R. § 758.5(b)(1)(i)(A).
[28] 15 C.F.R. § 758.5(b)(1)(i)(B).
[29] 15 C.F.R. § 758.5(b)(1)(i)(B).
[30] 15 C.F.R. § 758.5(c)(1).
[31] 15 C.F.R. § 758.8.
[32] 15 C.F.R. § 744.6(a)(1)(ii).

considered not to be in a position to assume responsibility for the export and is not the proper applicant for a license.[33] But a seller who, at the time of selling the items to the buyer, knew or had reason to know that an illegal export was going to be made would be liable.[34]

It is strictly a factual question whether a person "had reason to know." To avert problems, it is useful to follow a checklist of circumstances considered sufficiently suspicious to give someone "reason to know" about an illegal export.[35]

Suspicions that are reported and turn out to be erroneous can have drastic consequences. But, in all cases, the seller must make an effort to know the customer; and should report purchases which are clearly inconsistent with the type of trade normally expected from a given type of buyer. Failure to do so may expose the seller to liability under the law, if it is determined that the seller had "reason to know" about a violation.

The seller is not legally obligated to acquaint the buyer with U.S. export controls. But many buyers, blissfully innocent of export controls, might be grateful for the proverbial "word to the wise." A buyer who greets such unsolicited advice with a "mind your own business" could be a candidate for reporting.

If it turns out that a seller's suspicions were accurate, that seller could be in trouble. This would represent the classic "reason to know" situation.

The legalistic and mechanical distinction between an export sale and a domestic sale is inadequate. Strictly speaking, a domestic sale is one where title to the commodities and risk of loss pass in the United States. However, such a sale is nevertheless an export sale if the seller knows or has reason to know that it is merely the first step in a series of transactions that will see the item spirited out of the United States.

The release of technology or software source code to a foreign national in the United States is regulated[36] as is visual inspection by foreign nationals of U.S. facilities.[37]

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[33] 15 C.F.R. § 748.5(a)(2).

[34] 15 C.F.R. § 748.5(a)(2).

[35] See section 8.5 *infra*.

[36] 15 C.F.R. § 734.2(b)(2)(ii).

[37] 15 C.F.R. § 734.2(b)(3)(i).

Domestic sales, as contrasted with these release of technology rules, are regulated to the extent that they are in fact intended for export.[38]

Although the regulation of exports by the Department of Commerce is largely focused on transactions that involve the actual sending or taking of items out of the United States, domestic sellers are not altogether free of responsibility under export control laws and regulations. In the context of this discussion, the term "seller" should be understood to include all those who transfer items by any means.

The requirement for a license to support a nuclear, missile, or CBW transaction not authorized as required[39] does not explicitly mention domestic sales; but proscribed means of facilitation, other than the explicit ones of financing, transportation, and freight forwarding, might be construed as covering such sales.[40]

First and foremost, sellers are responsible for determining whether the role they play in a given transaction is that of exporter or domestic seller. This is relatively straightforward when a sale of goods is involved. In that circumstance the exporter is the person who, as the principal party in interest in the transaction, has the power and responsibility for determining and controlling the sending of the goods out of the United States. A domestic seller can be defined as the person who provides the exporter with the goods, whether through a sale, a lease, a gift, etc., and who has no control over the disposition of the goods from that point forward.

Making the distinction between exporter and domestic seller is not as simple when a transfer of technology is involved. In that

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[38] EAA section 5(a)(1) states:

> The authority contained in this subsection includes the authority to prohibit or curtail the transfer of goods or technology within the United States to embassies and affiliates of controlled countries. For purposes of the preceding sentence the term affiliates includes both governmental entities and commercial entities that are controlled in fact by controlled countries.

This authority has not been exercised, except indirectly through provisions concerning intent to export in 15 C.F.R. § 764.2(f, h).

[39] 15 C.F.R. § 744.6(a)(1)(ii).

[40] This interpretation is supported by the word "including" which appears before "financing, transportation, and freight forwarding."

case Commerce regulations define the term "export" to encompass transactions not normally considered exports, such as disclosure of technology or source code to a foreign national in the United States. Such disclosure is considered an export not only if the foreign national is in the United States temporarily, for example, for a plant visit, and plans to return abroad after a short visit, but also if the foreign national is employed in the United States and would prefer to remain here.

A domestic seller, even if not technically an exporter, has responsibilities arising from prohibitions against: (a) causing, aiding, and abetting a violation; or (b) acting with knowledge or reason to know of a violation.[41] In short, domestic sellers are not permitted to be indifferent to what the exporter might do with the goods or technology. To avert problems, it would be useful to follow a checklist.[42]

If you know or have reason to know that a violation has occurred or will occur, you should promptly cancel the transaction or at least put it on hold. It would be to your advantage to consult compliance officials in the Department of Commerce, advise them of the circumstances, and seek their advice. If you learn that a violation has occurred after the goods or technology have been transferred, you would be well advised to inform the government in confidence so that an investigation can be made without "tipping off" the probable violators.

A manufacturer is not obligated by the EAR to conduct investigations of customers or of their intentions. However, a manufacturer learning that a purchase is being, or has been, made under circumstances indicating that the goods will be shipped abroad in violation of the EAR, should so inform BXA.

A seller is under no obligation to terminate a sale on the basis only of suspicions. One or more of a number of steps can be taken for protection from involvement in a violation. A seller can inform the exporter of the exporter's responsibility for complying with the EAR. Many exporters, ignorant of controls, might be grateful for this information. This should be done in writing. A seller can also, or alternatively, condition delivery on the prior receipt of a copy of an export license. A third possibility is to communicate suspicions

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[41] 15 C.F.R. § 764.2(b, e).

[42] See section 8.5 *infra*.

in confidence to BXA. There is no legal obligation for domestic sellers to take any of these steps; but prudence dictates that some record of non-involvement be established when there are grounds for suspicion. On the other hand, it is important to be sensitive to the possible consequences of reporting erroneous suspicions to the government.

Much depends, of course, on the strength of the suspicions. If they are strong, the interest in demonstrating non-involvement will be keener and may well lead to taking substantial precautions, perhaps including termination of the sale.

6.4.2 Classification

The exporter must attempt to identify which ECCN (or EAR99) covers the proposed export.[43] This is a reasonable requirement. Industry is more familiar with the technical details of specific commodities, software, or technology than government can be. Moreover, Commerce cannot possibly formally classify everything, or even more than a small fraction of everything, moving in the export trade.

Nevertheless, an exporter may request a classification from Commerce. Form BXA-748P or its electronic equivalent must be used for this purpose.[44] A fax containing information required by the form but not using the form itself is not considered to be an electronic equivalent. The request should include a recommended classification together with reasons for such a classification. Reasons should include comparisons with the technical control limits specified in the relevant ECCN or ECCNs. For example, a recommended classification of EAR99 for a numerically controlled machine tool should be supported by technical specifications inferior to each element of ECCNs 2B001, 2B003, 2B201, 2B991, 9B115, and 9B116. If unable to recommend a classification, reasons for failing to do so must be given, including an identification of relevant ambiguities or deficiencies in the regulations.[45]

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[43] 15 C.F.R. § 732.3(b)(1)
[44] 15 C.F.R. § 748.3(b).
[45] 15 C.F.R. § 748.3(b)(2).

BXA will consider no more than six items in a single request, although several related items might be considered together on an exceptional basis.[46]

Commerce is obligated to respond to a classification request within ten working days.[47] However, Commerce interprets this requirement as applying only if the request is properly submitted. Commerce implies that any incomplete request will be returned, by admonishing the applicant to be certain that the request is complete and does not omit any essential information. Moreover, Commerce will take no action on a request not submitted on the prescribed Form BXA-748P.

The appeal procedures in 15 C.F.R. § 756 apply to a person directly and adversely affected by an administrative action believed to be unreasonable. This includes a BXA classification that the exporter believes is not supported by a reasonable interpretation of the EAR.

The Under Secretary for Export Administration or his person delegated by him will act on such an appeal.[48] Classification appeals are considered directly by the Under Secretary, without involving an administrative law judge or the hearing procedures described in 15 C.F.R.§ 766. However, the appellant may request, in writing, at the time of filing, an opportunity for an informal hearing.[49] The decision of the Under Secretary is final.[50]

An appeal must be filed not later than 45 days after the date appearing on the written notice of administrative action, in this case the date on the commodity classification action, or CCATS document, prepared by BXA.[51]

There is no prescribed format for information to be presented in a classification appeal. However, technical arguments using terminology in the relevant ECCN(s) are more likely to be persuasive than generalities or specifics expressed in terminology commonly used in the trade which differs from that used in those ECCNs.

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[46] 15 C.F.R. § 748.3(b)(1).
[47] EAA § 10(k)(1).
[48] 15 C.F.R. § 756.2(a).
[49] 15 C.F.R. § 756.2(b)(3).
[50] 15 C.F.R. § 756.2(c)(2).
[51] 15 C.F.R. § 756.2(b)(1).

6.4.3 Marketing

An understanding of the BXA licensing system by international marketing staff in both the home and overseas offices can avoid sales commitments that may not be fulfilled because of export control restrictions or time requirements for processing export license applications.

If overseas sales personnel understand the export licensing supporting documentation requirements,[52] a great deal of time, as well as sales, may be saved in the license approval cycle, since the proper documents will have been obtained as part of the process of initially applying for a license.

Also, costs incidental to internal company operations may be reduced, since additional communication is eliminated when obtaining from overseas staff the proper documents to support the license application. Some U.S. firms conduct periodic export licensing briefings as part of sales management programs to communicate ongoing export licensing requirements, potential licensing changes, and foreseeable future trends in government policies which may affect export licenses.

Representatives of BXA will, upon request, meet with company marketing and management personnel to review in-house licensing procedures and provide recommendations for improving and streamlining the firm's export licensing activities. Also, key officials from BXA participate in regional trade seminars throughout the United States to assist firms in staying current in export control matters. Department of Commerce district offices may also be of assistance in recommending consulting firms and in advising interested parties of export control seminars scheduled in their respective areas.

Published government pronouncements on foreign policy controls are reasonably accurate at the time of publication. But foreign policy changes frequently. Moreover, sometimes it is in the best interests of the U.S. Government to avoid public pronouncements regarding the use of export control restrictions as a foreign policy tool. Or a planned notification of a policy change may be delayed in the inter-agency clearance process. Also, exporters may have no way of knowing adverse information concerning an end-use or

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[52] Described in section 6.5.2 *infra*.

end-user that is available to the government. In short, the government's reaction to a proposed transaction is sometimes unpredictable. This situation can leave the U.S. exporter baffled. The EAR may state one policy concerning the possibility of exports to a country; but, in actual practice, the government may have quietly suspended the issuance of export licenses to that same country or end-user or end-use.

The seasoned international marketer stays abreast of the world political environment and uses independent country risk assessment services to reach determinations on overseas sales strategies. Seminars on international trade matters conducted by major trade and professional organizations are additional sources of input for a firm when assessing entry into new sensitive market areas.

The United States maintains unilateral foreign policy export controls and, in some instances, interprets a multilaterally-agreed control more restrictively than do other members of the relevant multilateral regime.

Consequently, at the same time the U.S. exporter is prevented from concluding a transaction by the Department of Commerce, a foreign competitor may be able freely to export comparable competitive products.

The Wassenaar arrangement and the multilateral regimes for non-proliferation of nuclear and chemical and biological weapons and missiles are considerably less disciplined than COCOM had been. Accordingly, there can be no assurance of restrictions on foreign competition concerning exports of multilaterally-agreed items. There is even less reason to expect parallel action in cases involving discrepancies between U.S. definitions and the multilateral wording on which they are ostensibly based.[53]

6.4.4 Reducing Administrative Costs

A strong company communication program directed at cognizant international personnel—both at home and abroad—should stress the importance of a full understanding of significant export licensing requirements. An effective program in this area can substantially reduce time and money expended on export controls.

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[53] See Appendices 4-2 through 4-4.

The Special Comprehensive License procedures[54] might help, since they were established specifically to lessen administrative costs of exporting firms by reducing the amount of time and of cumbersome paperwork required to obtain multiple export license approvals. A firm should carefully review these procedures to determine whether they would accommodate its export licensing requirements cost-effectively.

Other cost reduction considerations include: (1) training employees in this field by sending them to export licensing seminars; and (2) developing an in-house training program conducted by an export consultant. The obvious advantages of employee training is improved performance, but it may also serve as sound preventive maintenance, because errors will be avoided that could lead to the imposition of government sanctions, fines, or penalties.

6.4.5 Advisory Opinions

BXA renders a formal decision on a license application through the issuance or denial of a license based upon a formal application, supporting documentation, and evidence of an order. In some cases, however, negotiations for an export order may depend upon an indication of the prospects of obtaining an export license. Some guidance regarding the likelihood of obtaining a license may be found by reviewing licensing policy statements.[55] Also, the person proposing to export may receive a preliminary opinion from BXA on the outlook for approval by submitting an inquiry describing the proposed transaction in full detail and explaining why an advisory opinion is needed.[56] Such opinions are not binding.

6.4.6 Order

BXA, as a general policy, will not issue a license to export based merely on a business inquiry or a person's desire to develop foreign business. There must be an "order" from a foreign person or firm for a particular transaction before BXA will consider an export license application. But a binding contract is not required. It

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[54] 15 C.F.R. § 752.
[55] 15 C.F.R. § 742.
[56] 15 C.F.R. § 748.3(c).

is possible to meet the order requirement as long as the prospective customer has made more than a casual inquiry. To comply with the so-called "order" requirement, an applicant needs only an expression of intent from the prospective customer, or from the customer's agent, to make the purchase.

6.5 LICENSE APPLICATION

There are three types of permission to export: (1) no license required (NLR) provisions based on the Country Chart;[57] (2) License Exceptions;[58] and (3) a license. No license is required for NLR or License Exceptions, although various actions may be required before or after shipment.[59] A license can be either an individual license[60] or a Special Comprehensive License.[61]

6.5.1 How to Apply

Once a determination has been made that a Commerce export license is required for a specific export,[62] an application should be submitted to BXA. This may be done electronically, by regular mail, by express mail, or by hand delivery.

Prior authorization is required for electronic transmission.[63] Otherwise, completed Form BXA-748P should be used. A facsimile is not acceptable.[64] If submitted by regular mail, the form should be sent to:

Bureau of Export Administration
Office of Export Licensing
P.O. Box 273
Washington, D.C. 20044

If submitted by express mail or hand-carried, the address is:

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[57] 15 C.F.R. § 738.
[58] Described in 15 C.F.R. §§ 740, 744, 746, and 754.
[59] See sections 4.2.3.6 and 6.9.5.
[60] 15 C.F.R. § 748.
[61] 15 C.F.R. § 752.
[62] See Chapters 1 and 4.
[63] 15 C.F.R. § 748.7(a).
[64] 15 C.F.R. § 748.6(a).

Attn: "Application Enclosed"
U.S. Department of Commerce
14th Street and Pennsylvania Avenue NW, Room 2705
Washington, D.C. 20230

If, after submitting an application, an emergency situation arises necessitating expedited processing, contact the Exporter Counselling Division (telephone: 202-482-4811; telex: 892536; fax: 202-482-3617). If the emergency situation arises before the application has been submitted, the application should be accompanied by a letter with the title "Emergency Handling Request."[65] However, an application will not be expedited unless the emergency is an unforeseeable situation over which the exporter had no control.

Application forms may be obtained from any Department of Commerce District Office; from one of the two Western Regional Offices;[66] or by writing, telephoning, faxing, or visiting:

Export Counselling Division, Department of Commerce
14th Street and Pennsylvania Avenue NW, Room H1099D
Washington, D.C. 20230
Telephone: 202-482-4811; fax: 202-482-3617

Any person who is subject to U.S. jurisdiction and who is in fact the exporter may apply, either directly or through a duly authorized agent, for a license for export from the United States.[67] If a U.S. agent applies on behalf of a foreign party outside of U.S. jurisdiction, the U.S. agent becomes the applicant.[68]

"Order party" is defined as the person in the United States who conducted the negotiations with the foreign purchaser or ultimate consignee and who, as a result of these negotiations, received the order. Prior to 1996, the order party, if different from the applicant, was required to sign the application. However, Form BXA-748P makes no provision for an "order party" signature.

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[65] 15 C.F.R. § 748.4(h).

[66] 15 C.F.R. § 748.2(a).

[67] A foreign firm may apply for a license to reexport an item previously exported from the United States.

[68] 15 C.F.R. § 748.4(b); also see sections 6.4.1.1 and 6.4.1.2 *supra*.

An application for a license for a specific export may include multiple items, preferably related[69] and need not be limited to a single shipment.[70] However, such an application must be limited to a single consignee in a single destination. A single application for a Special Comprehensive License may include multiple products, multiple consignees, and multiple destinations.

Proprietary information must be disclosed to the extent necessary for the proper filing of the application. A statement should accompany the application identifying the confidential proprietary information and claiming exemption for such information from public disclosure under the Freedom of Information Act (FOIA).[71] Unauthorized disclosure or use of a trade secret by a government agency constitutes a criminal violation under U.S. law. However, such information may be disclosed if the Secretary of Commerce determines that release would "be in the national interest."[72] Release by the Congress requires a determination by the full Committee "that the withholding of that information is contrary to the national interest."[73]

Item-by-item instructions for completing application Form BXA-748P are included as part of the form.[74]

The Exporter Counselling Division can assist exporters in completing their application forms and can answer questions pertaining to the export licensing process. District Offices of the Department of Commerce, which are located across the United States, usually can provide basic assistance in completing the application form.

Private export consultants are also available in most major trade communities.

6.5.2 Supplementary Documents

Many applications must be accompanied by supplementary documents concerning the disposition abroad of the items intended for export. The document most often required is Form BXA-711

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[69] 15 C.F.R. § 748.6(d).
[70] 15 C.F.R. § 748.4(e).
[71] 6 U.S.C. § 662.
[72] EAA § 12(c)(1).
[73] EAA § 12(c)(2).
[74] They are also contained in 15 C.F.R. § 748 Supplement 1.

Statement by Ultimate Consignee and Purchaser. Alternatively, an International Import Certificate (IIC) or an Import Certificate issued by specified governments[75] may be required. Table 6-1 summarizes these requirements.

Exemptions from supplementary document requirements include the following:[76]

- The destination is in the Western hemisphere, except for Argentina.
- Both the ultimate consignee and the purchaser are foreign government(s) or "foreign government agency"(ies).[77]
- The shipment is to a registered relief agency.
- The export is for demonstration or testing.
- The shipment is of a short supply item.[78]
- The application is for a Special Comprehensive License.
- The items are software or technology.
- The items are for encryption.[79]
- The total value of the application is less than $5,000.[80]
- The applicant is the same person as the ultimate consignee.[81]

The exporter may also seek an exception from some of the requirements if there is no applicable exemption. A request for an exception may be granted for either a single transaction or multiple transactions under the following circumstances:

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[75] Bulgaria, China, Czech Republic, Hungary, India, Poland, Romania, or Slovakia.

[76] 15 C.F.R. §§ 748.9(a), 748.10(b)(3), and 748.11(a)(3).

[77] As defined in 15 C.F.R. § 772 and modified in 15 C.F.R. § 748.9(a)(2) last sentence.

[78] 15 C.F.R. § 754.

[79] 15 C.F.R. § 774 ECCNs 5A002 or 5B002.

[80] The $5,000 exemption from Import Certificate requirements applies to each ECCN, so that the value of the shipment might exceed $5,000 if it contains more than one ECCN.

[81] This exemption applies to Form BXA-711 Statement by Ultimate Consignee and Purchaser but not to the International Import Certificate nor to Import Certificates issued by national governments.

- Impose an undue hardship (*e.g.*, discriminatory refusal by the foreign government to issue a certificate).
- Cannot be complied with (*e.g.*, the export is intended for subsequent distribution to other countries).
- Is inapplicable (*e.g.*, the commodities will not be imported for consumption into the named country of destination).

Both the Form 711 and the IIC can cover more than one transaction, provided the license application includes a certification.[82] Some cooperating countries issue IICs only for single transactions. Those issuing them for multiple transactions will enter a general commodity description and omit quantity and dollar amount information.

If the importer does not intend to retain the commodities in the country issuing the IIC, the government issuing the document should stamp it with a triangular symbol. This indicates recognition of a further control responsibility by that government. It does not relieve the exporter of notifying BXA of all parties to the transaction, including those located outside the country issuing the IIC.

An exporter may assist an importer to fill out these forms. However, after they are signed, the exporter may not alter them in any way. If the exporter knows, or believes, that a document contains erroneous information, the exporter should not file it. Moreover, the exporter is required to notify BXA of any changes in relevant facts or circumstances that come to the exporter's attention subsequent to the issuance date of the document that indicate it contains erroneous information.[83]

BXA accepts documents in a foreign language only if accompanied by an accurate translation made by a translating service or certified by the applicant to be correct.[84]

6.6 LICENSE PROCESSING

A license application may be returned without action so that the exporter may correct some deficiency. Otherwise it will eventually be approved unconditionally, approved with conditions, or denied.

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[82] 15 C.F.R. §§ 748.10(f) or 748.11(e)(1)(ii).
[83] 15 C.F.R. § 764.2(g)(2).
[84] 15 C.F.R. § 748.9(f).

6.6.1 Deadlines

Deadlines for license processing follow:[85]

- Commerce within nine days of submission of an application:
  - —Contact the applicant if additional information is required.
  - —Return the application without action to correct deficiencies or if a license is not required.
  - —Refer the application to Defense, State, and Energy unless it is subject to a delegation of authority from that agency.
- Other agencies:
  - —Within ten days of receipt, request additional information.
  - —Within 30 days of receipt of the initial referral (not counting time between request for and receipt of additional information), recommend to BXA approval (with or without conditions) or denial (failure to provide a recommendation within 30 days to be deemed to be no objection to final decision by BXA).
- Chair of Operating Committee (OC) within 14 days after the deadline for receiving agency recommendations, inform other agencies of the Chair's decision on how to resolve agency disagreements.
- Other agencies within five days after receipt of OC Chair's decision to appeal to Advisory Committee on Export Policy (ACEP).
- Chair of ACEP within 11 days from receipt of escalation request, inform other agencies of majority vote of ACEP.
- Other agencies within five days of receipt of ACEP decision, appeal to Secretary of Commerce, as Chair of Export Administration Review Board (EARB).
- Secretary of Commerce within 11 days of receipt of appeal, inform other agencies of majority vote of EARB.
- Other agencies within five days of receipt of EARB decision, appeal to the President.

Most applications are processed within the deadlines. That, of course, is little comfort to one whose application happens to take

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[85] Exec. Order No. 12,981, 60 Fed. Reg. 62,981; 15 C.F.R. § 750.4(c-f) end.

longer. Applications for licenses for export are generally processed quickly unless:

- Subject to a specific foreign policy control.
- To an end-user suspected to be unreliable.
- Particularly sensitive, such as a computer above 12,500 mtops to the PRC.

Deadlines in the processing of denials are as follows:

- BXA, within five days of decision of intent to deny, notify applicant.
- Applicant, within 20 days of notification, respond.
- BXA, within 45 days of notification, advise applicant whether decision to deny has been changed as a result.
- Applicant, within 45 days of final denial, appeal.

6.6.2 Determining Case Status

Commerce has automated its tracking system. The Commerce system is called STELA, for System for Tracking Export License Applications. STELA may be accessed for classification requests as well as for license applications by calling 202-482-2752. For the status of advisory opinion requests, telephone: 202-482-4905 or fax: 202-219-9179.[86]

6.6.3 Emergency Processing

The majority of requests for emergency handling are turned down. If all cases that exporters wished to expedite were given "emergency handling," the system would not result in much expediting for anybody. Accordingly, Commerce limits the procedure to unforeseeable situations over which the exporter has no control. BXA goes to considerable trouble to see to it that qualifying cases are, indeed, given special treatment.

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[86] 15 C.F.R. § 750.5.

6.6.4 Appeal of Denial

An appeal from a denial must be sent, in writing, to the Under Secretary for Export Administration within 45 days of the date appearing on the written denial notice.[87] The appeal should contain a full statement, including why the appellant believes the administrative action has a direct and adverse effect and why it should be reversed or modified.[88] At the time of filing an appeal, an informal hearing may be requested.[89] The request may, or may not, be granted. The decision of the Under Secretary is final.

6.7 VALIDITY

There are special rules on license expiration and on license amendment.

6.7.1 Expiration

Individual licenses are generally valid for 24 months and extensions are generally not granted.

Applications reviewed and approved on an emergency basis expire the last day of the calendar month following the month in which the license was issued.[90]

Special Comprehensive Licenses are valid for four years and may, on request, be extended for an additional four years.[91]

6.7.2 Changes Requiring New Application

A replacement license is required for changes not specifically exempted from this requirement.[92]

6.7.3 Changes by Amendment

An individual license may be amended only by applying for and obtaining a replacement license. A Special Comprehensive License may be amended by submitting a new Form BXA-748P or BXA-752

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[87] 15 C.F.R. § 756.2(b)(1).
[88] 15 C.F.R. § 756.2(b)(2).
[89] 15 C.F.R. § 756.2(b)(3).
[90] 15 C.F.R. § 750.7(g).
[91] 15 C.F.R. § 752.9(a).
[92] 15 C.F.R. § 750.7(h)(4).

and obtaining BXA written approval for change in SCL holder, consignee name or address, new consignee, reexport territories, new items, or new end-uses.[93]

6.7.4 Changes Without Amendment

Changes that can be made without a new license or a replacement license are as follows:

Individual License:[94]

- Decrease in unit price or total value.
- Increase in price or quantity if permitted under shipping tolerances.[95]
- Increase in price related to transportation.
- Change in price in conformance with "price statement" on the license, *e.g.*, permitting market price.
- Change in intermediate consignee in the country of ultimate destination unless a consolidated shipment is involved.
- Change in continuity of shipment in Country Group B under specified conditions.[96]
- Change in address of purchaser or ultimate consignee within the same country shown on the license.
- Change in ECCN, unit of quantity, unit price, or wording to conform with a revision in the Commerce Control List (but not actual changes in the commodity, software, or technology to be shipped).

Special Comprehensive License not requiring prior BXA approval (but the information must be submitted to BXA either in a Form BXA-749P or in a Form BXA-752):[97]

- SCL holder address or contact information.
- Total value of license.

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[93] 15 C.F.R. § 752.10(b).
[94] 15 C.F.R. § 750.7(c)(1).
[95] 15 C.F.R. § 750.11.
[96] 15 C.F.R. § 750.7(c)(1)(vi)(A-E).
[97] 15 C.F.R. § 752.10(c).

- Deletion of consignee.
- Ownership or control of SCL holder or consignee.
- Removal of reexport territories.
- Removal of items.
- Removal of end-users.

6.7.5 Duplicate License

If a license is lost, stolen, or destroyed, the licensee may request a duplicate by letter.[98]

6.8 EXPORT CLEARANCE

The exporter is responsible for complying with export clearance requirements.[99] It should be noted that failure to comply with export clearance requirements, like failure to comply with other parts of the EAR, constitutes a legal violation subject to severe penalties.[100] Furthermore, the exporter is legally responsible for the proper use of the export license and the responsibility continues even when acting through a freight forwarder or other agent.

The four primary documents required for exporting are the export license (unless eligible for NLR or a License Exception), the Shipper's Export Declaration (SED), the carrier's bill of lading (or airwaybill), and the commercial invoice. This section 6.8 reviews each of these documents.

Other types of export documents may be prepared by the shipper, such as packing lists, banking documents, consular invoices, certificates of origin, and quality inspection certifications. These documents are not reviewed here, because they are not normally part of the export clearance process.

6.8.1 Role of Export License

The export license is the most important of the various documents. Under the general rules of conformity, other shipping

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[98] 15 C.F.R. § 750.9.

[99] These are, for the most part, in 15 C.F.R. § 758. But also see the Bureau of Census Foreign Trade Statistics Regulations (15 C.F.R. § pt. 30).

[100] See Chapter 8 on Enforcement.

documents must conform with information on the export license, except for shipments under a consolidated "master" airwaybill.[101]

A single Shipper's Export Declaration can cover commodities authorized by a license and other commodities not requiring a license. However, commodities listed on the same SED must be included in one shipment on board a single carrier and must be from the same exporter to the same consignee.[102]

A single SED can cover commodities authorized by more than one license or commodities qualifying for more than one exception from a license requirement.

For items authorized by a license, the license number, expiration date, ECCN, and item description must be entered in the designated spaces of the SED.

For items not requiring a license, the License Exception symbol or NLR must be entered in the appropriate column of the SED.[103] For exports under NLR because of NS Column 2 or under License Exception GBS, CIV, or LVS, the ECCN number must also be shown.[104]

The commodity description on the SED shall give enough detail to permit verification of the Schedule B number.[105] For items authorized by a Special Comprehensive License, the standard instructions for other licenses must be followed. The value must be shown, even though there is no value limitation on the SCL. The SCL number must be followed by a blank space and then the consignee number identifying the SCL's approved consignee.[106]

6.8.2 Shipper's Export Declaration

For most exports to foreign destinations, a U.S. Shipper's Export Declaration (SED) is required. The duly executed SED is a certification made by the exporter, declaring the existence of an

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[101] 15 C.F.R. § 758.4.

[102] 15 C.F.R. § 758.3(f).

[103] 15 C.F.R. § 758.3(h)(2). License Exception symbols may be found in 15 C.F.R. § 740 or 754.

[104] 15 C.F.R. § 758.3(h)(2). A proposal is pending that would broaden the requirement to show the ECCN to cover all exports not requiring a license.

[105] 15 C.F.R. § 758.3(g)(1) and (h)(1).

[106] 15 C.F.R. § 752.15.

export license or permission for an export under NLR or a License Exception.

The SED is a joint Bureau of the Census-Bureau of Export Administration form used for compiling official U.S. export statistics and for enforcing U.S. export controls. The Bureau of the Census uses it to accumulate statistical data published monthly by the Department of Commerce in publication FT-410, which summarizes the dollar volume of exports to individual countries in Schedule B commodity numbers. The Bureau of Export Administration uses it to document the existence of a license or permission under NLR of a License Exception for exports leaving the United States.

The exporting carrier is responsible for the completeness and accuracy of information on the SED regarding the name of the carrier, foreign port of unloading, and bill of lading or airwaybill number.

The exporter is responsible for designating on the SED the proper authority, either a license or NLR or a License Exception, and for all the statistical information on the SED.

An SED may not be filed after the license expiration date of an otherwise applicable license.[107]

The various representations made when presenting an SED to Customs or to a Postmaster are as follows:

- Statements and information set forth in the SED have been furnished by the exporter or by an agent on the exporter's behalf for the purpose of effecting an exportation.
- The commodity described on the SED is authorized under the export license or NLR or License Exception identified on the declaration.
- The statements contained in the SED are consistent in all respects with the contents of the license or the terms of the license requirement exception designated.
- All other terms, provisions, and conditions of the regulations applicable to the export have been met.

The SED must be filed, unless exempted, before export of all commodities to foreign countries or areas for shipments from the

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[107] 15 C.F.R. § 758.3(c).

United States, including the Commonwealth of Puerto Rico and the Virgin Islands. The SED must also be filed for shipments between the United States and Puerto Rico or the Virgin Islands, even though such shipments are not subject to the EAR.

The declaration must be prepared and signed by a duly authorized employee of the shipper, or his authorized agent. Agent authority is controlled by properly executed power-of-attorney forms, signed by the shipper or owner, which must be on file in the agent's office. Written authorization for such authority can be provided on the actual SED form.

The SED should be typewritten or prepared in ink or other permanent medium (except indelible pencil). Duplicating processes, such as ditto and hectograph, as well as the overprinting of selected items of information, are acceptable. The signature may be executed in ink or by signature stamp.

As of this writing, an electronic Automated Export System (AES) to replace paper SEDs is gradually being introduced.

Corrections, amendments, or cancellation of information may be submitted to the Bureau of the Census, the District Director of Customs at the port where the original shipment exited, or, if the shipment was mailed, to the Postmaster. These corrections must be filed by the shipper immediately following discovery of the error. A duplicate copy of the original filed SED and a new corrected copy highlighting the changes should be prepared, signed, and forwarded by the shipper or the shipper's authorized agent to the Customs point of departure.

Commodities hand-carried by an employee constitute an export for which an SED must be filed with the U.S. Customs agent before the employee departs. A declaration need not be filed if an exemption applies. A special caution for employees making verbal exemptions to U.S. Customs when hand carrying commodities: the traveling employee must be prepared to cite the type of exemption and the reason for that exemption to a U.S. Customs agent when requested to do so.

A partial list of the kinds of shipments for which SED filings are not required when those shipments are not moving under an export license follows:

- Shipments where either the shipper or the addressee is not a business concern.

- Shipments by mail valued under $500.
- Shipments by mail where the goods are not exported for commercial consideration.
- Technical data shipped by mail regardless of export license requirements or value.[108]
- Shipments of diplomatic pouches and their contents.
- Shipments of human remains and accompanying receptacles and flowers.
- Shipments not requiring a license valued at less than $2,500 per Schedule B number destined for a country in Country Group B.
- Shipments from one point in the United States to another by routes passing through Canada or Mexico, and shipments from one point in Canada or Mexico to another by routes passing through the United States.
- Shipments of all commodities consigned to the United States Armed Forces, including the Armed Services Exchange Systems.
- Company business records from a U.S. firm to its subsidiary or affiliate.
- Baggage, personal effects, and tools of the trade of a person leaving the United States providing such articles:
  - —Include only articles owned by the person or member of his immediate family.
  - —Shall be in that person's possession at the time of or prior to departure from the United States.
  - —Are necessary and appropriate and intended for the personal use of the person or his immediate family.
  - —Are not intended for sale.
  - —Are not moving as cargo under a bill of lading.

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[108] Technical data presumably includes software as well as technology. The regulations are silent as to whether an SED is required for technology or software exported by means other than mail.

—Export to Canada, unless it requires a Commerce license, is under State jurisdiction, or is destined ultimately for a third country.

6.8.3 Bill of Lading

The bill of lading completes the clearance process so that an authorized export can be shipped from the United States.

A freight forwarder normally prepares the bill of lading. He does so on behalf of the exporter and must strictly adhere to the exporter's shipping instructions.

The exporter should complete a Shipper's Letter of Instructions (SLI) or a company letter conveying your instructions to the freight forwarder to deliver the merchandise with the SED and the bill of lading to the carrier for inclusion on the vessel's manifest by the carrier.

The carrier is responsible for checking the accuracy of all export documents and then for filing them with U.S. Customs for approval and for release of the vessel.

In connection with the bill of lading, the exporter must verify that:

- The bill of lading contains a destination control statement in clearly legible form conforming with the commercial invoice(s).
- The consignee and places of shipment listed on the bill of lading are consistent with those on the export license.
- The freight tariff classification selected for the bill of lading is consistent with the description shown on the export license and with the description shown on the SED.

6.8.4 Commercial Invoice

The commercial invoice contains the terms of sale with the foreign buyer. It is frequently used by the buyer for Customs clearance of the merchandise in the foreign country. It is sometimes required for foreign exchange purposes. It may be used by a bank, Customs official, foreign consulate, insurance company, or import broker in processing the transaction.

Normally the exporter prepares the commercial invoice.

The exporter must promptly send copies to the ultimate consignee and to the purchaser named in the SED, the intermediate consignee, and any other persons named in the invoice.

6.8.5 Destination Control Statement

For many transactions, a prescribed destination control statement (DCS) must be entered and the same statement must appear on all copies of the invoice. The text to use is as follows:[109]

> (These commodities are) (This technology is) (This software is) exported from the United States in accordance with the Export Administration Regulations. Diversion contrary to U.S. law is prohibited.

The purpose of the DCS is to notify the consignee that diversion of the items being shipped contrary to U.S. law is prohibited. A Destination Control Statement is required if the export is under:

- A license, including the Special Comprehensive License.
- License Exception LVS, GBS, CIV, CTP, TMP, or RPL.
- No License Required (NLR) if the reason for control is NS or NP.

A Destination Control Statement is not required for:

- Reexports.
- Exports from the United States not requiring a license because of:
  - —License Exception TSR, GOV, GFT, TSU, BAG, AVS, SPR, SS-SAMPLE, TAPS, or WRC.
  - —NLR for other than NS or NP reasons.
  - —EAR99.

At the discretion of the exporter or his agent, a destination control statement may be entered on the shipping documents when not required.[110]

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[109] 15 C.F.R. § 758.6(b).
[110] 15 C.F.R. § 758.6(a)(2).

An exporter's foreign subsidiary or distributor is not required to place the DCS on its commercial invoices when selling U.S.-origin goods overseas provided by the exporter except for consignees under Special Comprehensive Licenses.[111] However, placing "anti-diversion" clauses in agreements with distributors and requesting wholly-owned foreign subsidiaries to include in their sales contracts a notification to the effect that U.S.-origin goods may not be diverted to third countries without prior U.S. Government approval would provide some protection for the exporter in the event of a violation.

6.8.6 Shipping

The EAR contains rules on shipping tolerances, port of export, delayed ship, non-arrival, and exports by mail.

6.8.6.1 Shipping Tolerances

Shipping tolerance rules permit deviations from data on the export license. Unless there is a specific tolerance limit on the license or there is a smaller tolerance established in a Supplement to 15 C.F.R. § 754 for short supply items, shipping tolerances depend on what is stated in the "Unit" paragraph for the applicable ECCN, as follows:[112]

- Report in "number": shipping tolerance of 25 percent of the dollar value but no tolerance to increase the number of units.
- Report in "$ value": no tolerance to exceed the stated dollar value.
- Report in a weight or measure:

  —10 percent tolerance on the weight or measure.
  —25 percent tolerance on the total dollar value shown on the license.
- Report some items in "$ value" and other items in other units: the 25 percent tolerance in the dollar value applies only to the stated value on the license for that portion of the goods reported

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[111] 15 C.F.R. § 752.15(b).
[112] 15 C.F.R. § 750.11.

by "number" or by weight or measure and does not apply to the total license value.

6.8.6.2 Port of Export

Exports may depart from any U.S. port unless otherwise noted on the face of the export license.

For shipments leaving the United States twice, the last port is considered the port of export. For example, Boston would be regarded as the port of export for a shipment leaving Seattle for Canada, reentering the United States at Boston, and then finally departing the United States from Boston.

6.8.6.3 Delayed Ship

If the ship scheduled to export the goods is delayed until after the license expires, the exporter should ask Customs or BXA for permission to proceed with that shipment.[113]

6.8.6.4 Non-Arrival

If items exported under a license did not arrive at their intended destination, the exporter may reship under the same license after furnishing BXA with an explanation of the circumstances (*e.g.*, lost at sea).[114]

6.8.6.5 Exports by Mail

Rules for exporting by mail follow:[115]

- The package wrapper for an item exportable under a license must be marked on the address side with the license number. The sender retains the license document and records shipments on the reverse side of the license.
- The package wrapper for an export not requiring a license must be marked with the License Exception symbol or "No License

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[113] 15 C.F.R. § 758.2(b).
[114] 15 C.F.R. § 758.2(c).
[115] Also see 15 C.F.R. § 768.1(d).

Required" before presenting it to the post office. Technology not requiring a license need not be so marked.

- Only one LVS shipment per calendar week may be made by the same exporter to the same importer.
- One copy of an SED must be filed with the post office at time of mailing for:

  —Commodities exceeding $500 from one business concern to another business concern.
  —Any commodity covered by an export license, regardless of value or whether the sender or addressee is a business concern.
- Technology shipped by mail does not require an SED, regardless of export license requirements or value.

6.9 POST-SHIPMENT RESPONSIBILITIES

This section describes the exporter's responsibility concerning Delivery Verification Certificates, disposition of licenses, internal audits, and recordkeeping.[116]

6.9.1 Delivery Verification

A U.S. exporter may be asked to submit to BXA a Delivery Verification Certificate (commonly referred to as a DV).[117] This is a formal document issued by the foreign government of the country of ultimate destination as evidence that the U.S. commodities have officially entered the approved country of destination. The importer is responsible for obtaining it and forwarding it to the licensee.

This document is requested only for exports for which an International Import Certificate (IIC) is required as a supporting document for a license application.[118]

The exporter must transmit to the foreign importer a written request for a Delivery Verification Certificate at the time of making each shipment under the license. After the last shipment has been made against the license, the exporter must send to BXA the original

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[116] Also see Chapter 4 for exporter actions after using License Exceptions.

[117] 15 C.F.R. § 748.13.

[118] The countries involved are listed in the first entry of Table 6-1. Exemptions and exceptions from the IIC requirement are described in section 6.5.2.

copy of this certificate (or these certificates in the event several partial shipments are made), which has been obtained from the importer. If unable to obtain these certificates, the exporter must notify BXA and, upon request, make available evidence of attempts to obtain them.[119]

6.9.2 Disposition of License

The exporter must retain the license, supplementary documents, and records of shipments. However, if BXA revokes or suspends the license, the exporter must return it to BXA.[120]

6.9.3 Revocation or Suspension of License

BXA might revoke or suspend a license as part of an enforcement action or administrative sanction.[121] This might also be done because of a change of policy. For example, all licenses for export to the USSR were suspended for several months after the Soviet invasion of Afghanistan in 1979 and, pursuant to changed policy developed in early 1980, some of those suspended licenses were revoked rather than reinstated.

The EAA was amended in 1985 to include a "contract sanctity" provision.[122] However, the President can overcome the prohibition by determining, and certifying to the Congress, that a direct threat to the U.S. strategic interest so warranted.

The EAR states that contract sanctity is not available for the following reasons for control:

- Nuclear non-proliferation.[123]
- National security.[124]
- Regional stability.[125]

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[119] 15 C.F.R. § 748.13(d).

[120] 15 C.F.R. § 750.8(b).

[121] 15 C.F.R. § 764.3.

[122] EAA section 6(p) prohibits the curtailment of exports under contracts predating a new foreign policy control or under already-issued licenses.

[123] 15 C.F.R. § 742.3(c).

[124] 15 C.F.R. § 742.4(c).

[125] 15 C.F.R. § 742.6(c).

- High performance computers.[126]
- Communications intercept devices.[127]
- Significant items transferred from State.[128]
- Specially designated terrorists.[129]
- Foreign terrorist organizations.[130]

6.9.4 Audits

The exporter should periodically perform post-shipment audits and BXA might request exporter assistance in a BXA audit. In addition, the EAR requires post-shipment verifications in specified circumstances.

The exporter's internal control program should be reviewed on a continuing basis to make sure that it is functioning in the intended manner. This is particularly relevant for Special Comprehensive License holders, because of the need to deter diversions after export but before the distributor has completed retransfers to ultimate end-users. Internal audits are one of the specified components of an SCL Internal Control Program.[131] BXA might conduct a post-license audit, a mini-audit, or a pre-license audit of license holders and consignees under an SCL.[132] A post-license audit generally involves interviews, inspection of records, and review of internal control programs. Under a mini-audit, a consignee may be required to submit to BXA a list of sales under a license during a specified time period. A pre-license audit would supplement the required pre-license consultation with BXA by an investigation of the exporting firm's credentials and reliability.[133] The U.S. exporter is expected to cooperate with BXA and to encourage consignees and distributors to cooperate as well.

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[126] 15 C.F.R. § 742.12(c).
[127] 15 C.F.R. § 742.13(c).
[128] 15 C.F.R. § 742.14(c).
[129] 15 C.F.R. § 744.13(d).
[130] 15 C.F.R. § 744.14(d).
[131] 15 C.F.R. § 752.11(c)(6).
[132] 15 C.F.R. §§ 752.13(a) and 752.14.
[133] 15 C.F.R. § 752.14.

Foreign distributors are subject to the territorial jurisdiction of the government where they are located. Foreign governments generally resist the exercise of U.S. jurisdiction within their territory. However, many foreign governments recognize the need for controls on the reexport of U.S.-origin items from their countries and cooperate with U.S. authorities in this regard. Sometimes this cooperation consists of permitting U.S. officials to conduct audits; at other times it consists of actually conducting the audits themselves. Exporter encouragement of foreign firms to cooperate with U.S. audits should be subject to recognition that these firms are required to comply with the wishes of the government where they are located.

6.9.5 Retention of Records

Specified types of records must be retained.[134] Basically, they include all records relevant to the EAR.

Records must be retained for five years, or longer if requested by a government agency or related to a voluntary disclosure.[135]

Post-shipment verification procedures for high performance computers to Computer Tier 3 countries call for submission of data to BXA.[136]

Post-shipment reports must be submitted to BXA after exporting from the United States under License Exception GBS, CIV, TSR, LVS, CTP, or GOV.[137] If a Tier 3 computer report has been submitted, this separate report is not required for the same transaction.[138]

Post-shipment reports are required after use of License Exceptions KMI or ENC for encryption items.[139]

A packing list, or equivalent, must be sent to BXA when exporting pursuant to License Exception TMP new media.[140]

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[134] 15 C.F.R. § 762.2(a)(1) and other sections of the EAR referenced in § 762.2(b).

[135] 15 C.F.R. § 762.6.

[136] Required by the National Defense Authorization Act (NDAA) for fiscal year 1998 (Pub. L. No 105-85, 111 Stat. 1629) and by 15 C.F.R. § 740.7(d).

[137] 15 C.F.R. § 743.1(b).

[138] 15 C.F.R. § 740.7(d)(5)(v)(A).

[139] 15 C.F.R. §§ 740.8(d) or 740.17(g). See Chapter 5 *supra*.

[140] 15 C.F.R. § 740.9(a)(2)(viii)(B).

TABLE 6-1
Supplementary Documents Summary

If the commodity is controlled for NS reasons	and the country of destination[1] is	Required document is	15 C.F.R. §
	Argentina, Australia, Austria, Belgium, Denmark, Finland, France, Germany, Greece, Hong Kong, Ireland, Italy, Japan, Republic of Korea, Liechtenstein, Luxembourg, Netherlands, New Zealand, Norway, Pakistan, Portugal, Singapore, Spain, Sweden, Switzerland, Taiwan, Turkey, United Kingdom	International Import Certificate issued by the government of the country of destination	748.10(b)
	People's Republic of China (PRC)[2]	PRC End-User Certificate	748.11(a)(1)
	Bulgaria, Czech Republic Hungary, India, Poland Romania, Slovakia	Import Certificate issued by the government of the country of destination	748.11(a)(1)
	All other destinations except those listed in § 748.9(a)(1)	Statement by Ultimate Consignee and Purchaser From BXA-711	748.11(a)
Other items	All destinations except those listed in § 748.9(a)(1)	Statement by Ultimate Consigness and Purchaser Form BXA-711	748.11(a)

[1]The country of the ultimate consignee, rather than the country of the purchaser if different, is determining.

[2]For the PRC, a Statement of Ultimate Consignee and Purchaser may be substituted for a PRC End-User Certificate for an export valued at $75,000 or less for servicing items previously exported to a non-Chinese entity.

APPENDIX 6-1 Removal of Inconsistencies Within Export Administration Regulations

Suggested Line-In Line-Out Revisions
From EAR text in effect March 20, 2000
(additions and ~~deletions~~)
(Explanations are given the first time the issue arises; they are not repeated thereafter)

730.5(c):

. . . shipments from a U.S. foreign trade zone unless specific conditions are met . . .

(Continue the *de facto* 770A.6 exception from "subject to the EAR")

730 Supplement 3

Hazardous Wastes:
Environmental.Protection Agency 42 USC 6938ff; 40 CFR 262.50ff
Toxic Substances:
Environmental.Protection Agency 15 USC 2611(b); 40 CFR 707.60
Insecticides and Pesticides:
Environmental.Protection Agency 7 USC 1360(a,b);40 CFR 168.75
Hazardous Substances:
Consumer Product Safety Commission 15 USC 1191, 1193, 1261, 2087; 16 CFR 1010, 1019

732.1(c):

~~Are your items and activities~~ Is your export, reexport, or other activity subject to the EAR? You should first determine whether your ~~commodity, software, or technology~~ contemplated transaction is subject to the EAR . . . If you already know that your ~~item or activity~~ transaction is subject to the EAR . . . If your ~~item or activity~~ transaction is not subject to the EAR . . .

(The EAR does not control "items"; it does control exports or reexports of items, as well as other activities. The Commerce Control List of "items" is inadequate to distinguish which agency has jurisdiction because:

Treasury (OFAC) controls exports or reexports of every item on the CCL for specified destinations and specified types of transactions.

Exports or reexports of the technology which the Patent and Trade Mark Office (PTO) controls is also subject to the EAR when the conditions of the BXA delegation of authority to PTO are not met.
The EAR and DOE have concurrent controls on nuclear technology — see 744.2.
The "not elsewhere specified" modifier for EAR99 leaves the reader uninformed as to which items are specified by other agencies, such as DOS and NRC.
744.6(a)(1)(i) controls exports, reexports, or transfers of items not on the CCL pursuant to 732.3(j).)

732.1(d):

Does your ~~item~~ export, reexport, or other activity require a license under one or more of the ten general prohibitions?
(1) . . .

(ii) General Prohibition Two (~~Parts and Components~~ U.S. Content Reexports): Reexport ~~and export from abroad~~ of ~~foreign made items incorporating~~ more than a *de minimis* amount of controlled U.S. content incorporated in, or commingled with, a controlled foreign-made item.

. . .

(v) . . . to prohibited ~~end user or end users~~ end-use or end-user.

. . .

(viii) . . . ~~In transit shipments and items to be unladen from vessels and aircraft~~ Shipments in transit through specified foreign countries.

(ix) . . . Violation of ~~any~~ orders, terms, or conditions

(2) Controls on exports or rexports of items on the Commerce Control List (CCL). If your ~~item~~ export, reexport, or other activity is subject to the EAR . . . These steps refer to General Prohibitions One (Exports and Reexports), Two (~~Parts and Components~~ U.S. Content Reexports) . . .

(General Prohibition Two applies to software and technology as well as to parts and components; it applies to the U.S. content, not to the foreign-made item; "export from abroad" is redundant, since "reexport" is defined as shipment from one foreign country to another foreign country.

General Prohibition Eight does not address special rules for items transiting the United States (or Canada or Mexico). Deviation from some license terms is not a violation per 750.7(c))

732.1(e):

. . . However, exceptions from license requirements for end -use/end-user controls are specified in part 744 of the EAR, ~~selected License Exceptions~~ for embargoed destinations are specified in part 746 of the EAR, and ~~License Exceptions~~ for short supply controls are specified in part 754 of the EAR. If a License Exception or No License Required (NLR) provision is available and ~~the~~ your transaction is an export ~~is~~ from the United States, you should review Steps ~~26~~ 27 through ~~28~~ 29 concerning Shipper's Export Declarations to be filed with the U.S. Customs Service or the U.S. Post Office, Destination Control Statement s ~~for export control documents~~, and recordkeeping requirements. If ~~a License Exception is not available~~ there is no provision excepting your transaction from a license requirement, go on to Steps 25 through 29.

(Destination Control Statements are not "for" documents)

732.1(f):

. . . filed with the U.S. Customs Service or the U.S. Post Office, . . .

732.2(a) intro:

Step 1: ~~Items~~ Exports, reexports, or other activities subject to the ~~exclusive~~ jurisdiction of another Federal agency. ~~This step is relevant for both exports and reexports.~~ Determine whether your ~~item~~ export, reexport, or other activity is subject to the ~~exclusive~~ jurisdiction of another Federal Agency ~~as provided~~ listed in 734.3 of the EAR.

(The word "exclusive" makes some sense when modifying "items," because both Treasury and Commerce control items on the CCL; but, when modifying "exports, reexports, or other activities," the word would irrationally envisage that some transactions are intentionally subject to the concurrent jurisdiction of two or more agencies.

734.3 lists, but does not "provide," the jurisdictions of other Federal Agencies.)

732.2(a)(1):

If your ~~item~~ export, reexport, or other activity is . . .

732.2(a)(2):

If your ~~item~~ export, reexport, or other activity is not . . .

732.2(c):

. . . For an item in a foreign country, you should determine whether the item is ~~of U.S. origin~~ wholly of foreign-origin. If so, its reexport is not subject to the EAR unless one of the conditions in 734.3(a)(6), (7), or (8) applies. If it is wholly of U.S.-origin, skip to Step 7 in 732.2(b) of this part. If it is ~~not of U.S. origin~~ U.S. origin content in a foreign-made item, then proceed to Steps 4 and 5 in paragraphs (d) and (e) of this section.

(See below for suggested addition of 734.3(a)(6),(7) and (8); Steps 4 and 5 are relevant to items partially of U.S.-origin)

732.2(d):

. . . This step is ~~appropriate~~ applicable only for controlled items that are made outside the United States.

732.2(d)(1):

For ~~an~~ a controlled item made in a foreign country . . .

732.2(d)(3):

If the foreign-made item would not require a license for reexport to the country of ultimate destination or if the foreign-made item contains no U.S. parts, components, ~~or~~ materials, software, or technology requiring such a license ~~are incorporated~~ or if the controlled incorporated U.S. parts, components, and materials or commingled U.S. software or technology are below the *de minimis* levels described in 734.4 of the EAR and in 734 Supplement 2, then the U.S. content in the foreign-made item is not subject to the EAR by reason of the ~~parts and components~~ U.S. content rule~~, the~~

~~classification of a foreign made item is irrelevant in determining the scope of the EAR,~~ and you should skip . . .

(Classification is relevant; only controlled items are affected)

732.2(d)(4):

If the foreign-made item is controlled and incorporated U.S. -origin controlled parts, components, or materials or commingled U.S.-origin controlled software or technology ~~are incorporated and~~ are above the applicable *de minimis* level, . . .

732.2(e):

~~Foreign made items incorporating more than~~ U.S. content exceeding the de minimis level ~~of U.S. parts, components or materials~~. ~~This step is appropriate only for~~ If the U.S.-origin controlled content incorporated in, or commingled with, a controlled foreign-made items ~~incorporating certain U.S. parts. If the incorporated U.S. parts~~ exceeds the relevant *de minimis* level, then your ~~export from abroad~~ reexport is subject to the EAR. You then . . .

732.2(f)(3):

Subject to the EAR. If your ~~item~~ reexport is captured by the foreign-produced direct product control at General Prohibition Three, then your ~~export from abroad~~ reexport is subject to the EAR. . . . If your ~~item~~ reexport is not captured by General Prohibition Three, then your ~~export from abroad~~ reexport is not subject to the EAR. . . . Note that, in summary, ~~items in foreign countries are~~ a reexport is subject to the EAR when ~~they are~~ it is of:

(i) A U.S.-origin ~~commodities~~ commodity, software ~~and~~ or technology unless the reexport is controlled ~~for export exclusively~~ by another Federal agency, ~~or unless~~ the item is publicly available (other than encryption or subject to other activity controls), or the item is *de minimis* U.S. content in a foreign-made item or falls outside the~~;~~

~~(ii) Foreign origin commodities, software, and technology that are within the scope of General Prohibition Two~~

~~(Parts and Components Reexports) or~~ General Prohibition Three (Foreign-Produced Direct Product Reexports) rule; or

(ii) A non-U.S.-origin item involving Rwanda, Serbia & Montenegro, non-proliferation activity, or sanctions as described in 734.3(a)(6) through (8). ~~(However, such foreign made items are also outside the scope of the EAR if they are controlled for export exclusively by another Federal agency or publiclyavailable.)~~

732.3(a):

Introduction. If your ~~item~~ export, reexport, or other activity is subject to the scope of the EAR . . . Two (~~Parts and Components~~ U.S. Content Reexports)

732.3(c):

. . . Note that part 754 of the EAR concerning short supply controls ~~is self contained and is the only location in the EAR that contains both the~~ contains export prohibitions not identified on the Country Chart and exceptions ~~applicable to short supply controls~~ not listed in part 740; but General Prohibitions Four through Ten apply to short supply controls as do selected License Exceptions described in part 740 and referred to in part 754 and restrictions on the use of License Exceptions contained in part 740.

732.3(d)(2)(i):

. . . Two (~~Parts and Components~~ U.S. Content Reexports) . . .

732.3(d)(2)(iii):

. . . Two (~~Parts and Components~~ U.S. Content Reexports) . . .

732.3(e):

Step 10: U.S.-origin content incorporated in, or commingled with, foreign-made items ~~incorporating U.S. origin items~~ and the *de minimis* rule.

(1) ~~Parts and components~~ U.S. content rule. The following considerations are ~~appropriate for items abroad and are the same steps~~ necessary to determine whether U.S. content incorporated in, or commingled with, a foreign-made item ~~incorporating U.S. parts, components, or materials~~ is subject to the EAR (see step 5 in 732.2(e) of this part). If ~~your~~ the

foreign-made item is described in an entry on the CCL and the Country Chart requires a license to your ~~export or~~ reexport destination, you should determine whether the controlled U.S.-origin commodities, software, or technology incorporated ~~into~~ in or commingled with the foreign-made item exceeds the *de minimis* level applicable to the ultimate destination of the foreign-made item, as follows:

732.3(f):

. . . The following considerations are ~~appropriate for items abroad and are the same considerations~~ necessary to determine whether a foreign-produced direct product is subject to the EAR ~~under~~ (see Step 6 in 732.2(f) of this part).

(1) If ~~your~~ the foreign-produced item is described in an entry on the CCL and the Country Chart requires a license to ~~your export or~~ the reexport destination for national security reasons, you must determine whether ~~your~~ that item is subject to General Prohibition Three (Foreign-Produced Direct Product Reexports) (736.2(b)(3) of the EAR). ~~Your~~ That item is subject to this general prohibition if ~~your~~ the transaction meets each of the following conditions:

(i) Country scope of prohibition. ~~Your export or~~ The reexport destination . . .

(ii) Scope of technology or software used to create direct products subject to the prohibition. Technology or software that was used to create the foreign-produced direct product~~, and such technology or software that~~ was subject to the EAR . . .

(2) License Exceptions. Each License Exception described in part 740, 744, or 746 of the EAR overcomes General Prohibition Three (Foreign-Produced Direct Product Reexports) if all terms and conditions of a ~~given~~ License Exception are met ~~by the exporter or reexporter~~.

(Some License Exception terms and conditions must be met by the importer)

732.3(g)(1):

. . . General Prohibition Four (Denial Orders) applies to all ~~items subject to the EAR, i.e. both~~ items on the CCL ~~and within~~ including EAR 99

732.3(h)(1):

. . . Two (~~Parts and Components~~ U.S. Content Reexports) . . . Unless otherwise indicated, the license requirements of General Prohibition Five (End-Use and End-User) described in part 744 of the EAR apply to all ~~items subject to the EAR, i.e. both~~ items on the CCL ~~and within~~ including EAR 99. . . .

732.3(i):

. . . ~~Bosnia Herzegovina, Croatia,~~ . . . Unless otherwise indicated, General Prohibition Six (Embargo) applies to all ~~items subject to the EAR, i.e. both~~ items on the CCL ~~and within~~ including EAR 99. You may not make an export or reexport contrary to the provisions of part 746 of the EAR without a license unless:

(1) ~~You are exporting or reexporting only publicly available technology or software or other items outside the scope of the EAR~~ Your transaction is excepted from "subject to the EAR" by 734.3(b)(2, 3, 4, 5, 6, or 7), or

(2) You qualify for a License Exception or other exception from license requirements specifically ~~referenced~~ authorized in part 746 of the EAR ~~concerning embargoed destinations. You may not use a License Exception described in part 740 of the EAR to overcome General Prohibition Six (Embargo (736.2(b)(6) of the EAR) unless it is specifically authorized in part 746 of the EAR.~~ Note that part 754 of the EAR contains additional prohibitions and exceptions concerning short supply controls ~~is self contained and is the only location in the EAR for both the prohibitions and exceptions applicable to short supply controls~~.

(See below for suggested new 734.3(b)(5, 6, 7))

732.3(j)(1):

. . . Two (~~Parts and Components~~ U.S. Content Reexports) . . .

732.3(k):

. . . General Prohibition Eight applies to ~~all items subject to the EAR, i.e. both~~ items on the CCL ~~and within~~ including EAR99 if a license would be required for export to the country being transited.

732.3(l):

. . . General Prohibition Nine ~~(Orders, Terms, and Conditions)~~ (Violations), by cross-referencing 764.2(a), prohibits the violation of any orders, terms and conditions imposed under the EAR in the absence of an exception in the EAR or a license or other authorization issued by BXA, except for non-material license changes listed in 750.7(c)(1) or 752.10(c).

732.3(m):

. . . License requirements under the EAR are determined ~~solely~~ primarily by the classification, end-use, end-user, ultimate destination, and ~~conduct~~ activity of U.S. persons. . . . General Prohibition Ten applies to all ~~items subject to the EAR, i.e. both~~ items on the CCL ~~and within~~ including EAR99. . . .

(The General Prohibition Eight license requirement is determined by the country of transit.)

732.3(n):

. . .

(1) If none of the ten general prohibitions or "subject to the EAR" transactions described in 734.3(a)(6-8) is applicable to your ~~export from the United States~~ transaction, no license from BXA is required~~,~~ and you do not need to qualify for a License Exception under part 740 , 744, 746, or 754 of the EAR. . . .

(2) ~~If none of the ten general prohibitions is applicable to your reexport or export from abroad, no license is required andyou should skip all remaining steps.~~

732.4(a):

. . . If your export or reexport or other activity is subject to General Prohibition Four (Denial Orders), Seven (U.S. Person Proliferation Activity), ~~Eight (In Transit),~~ Nine (~~Orders, Terms, and Conditions~~ Violations), or Ten (Knowledge Violation to Occur), there are no License Exceptions available . . .

732.4(b)(1):

. . . If no general prohibition or "subject to the EAR" transactions described in 734.3(a)(6-8) applies . . . need not review

parts 740, 744, 746, or 754 of the EAR regarding License Exceptions. You are reminded of your obligations concerning recordkeeping ~~obligations related to the~~ and export clearance ~~of the U.S. Customs Service provided~~ described in parts 762 and 758 of the EAR.

(Recordkeeping obligations are not limited to customs clearance)

732.4(b)(3)(i):

. . . Eligibility for License Exceptions is based on such factors as the item, . . .

732.4(b)(3)(ii):

. . . until you have determined ~~that no~~ whether or not any License Exception is available.

732.4(b)(3)(iii):

License Exception TMP, RPL, BAG, AVS, GOV,GFT, KMI, ENC, and TSU authorize exports notwithstanding the provisions of the CCL, as do License Exceptions SPT, SS-SAMPLE, TAPS, and WRC . . . . License Exception APR, 742.8(a)(2), 742.9(b)(1)(iv), and 742.10(a)(2) authorizes re-exports only.

732.4(b)(4)(i):

Countries are arranged ~~in country groups~~ alphabetically for ease of reference. For ~~a listing of country groups~~ an identification of which countries are eligible for the No License Required (NLR) exception from license requirements, please refer to the "x's" in the indicated columns in the Country Chart in Supplement No. 1 to part ~~740~~ 738 of the EAR.

732.4(b)(4)(ii):

. . . No Liceense Exceptions described in part 740 of the EAR may be used for items listed on the CCL as controlled for Short Supply reasons, except for return of unwanted shipments or shipments refused entry and for official use of U.S. Government agencies, as described in 740.9(b)(3,4) and 740.11(b)(2)(ii). License Exceptions available only for short supply items are found in part 754 of the EAR.

(For consistency with 771A.1(c)(10))

732.4(b)(7):

. . . Exporters~~,~~ and reexporters~~, and exporters from abroad~~ should review . . .

732.5(a):

. . . Reexporters ~~and firms exporting from abroad~~ may . . .

732.5(a)(1):

NLR. The term "NLR" represents exports ~~of listed items~~ when no license is required. ~~Such exports do not require that~~ to a non-embargoed destination, based on an EAR99 classification or on the lack of an "x" in all applicable columns of the Country Chart, rather than because you qualify for a License Exception. The symbol "NLR" is required on the SED under two circumstances. First, NLR is the correct symbol when ~~exporting~~ making an export subject to the EAR of an item ~~subject to the EAR~~ not listed in an ECCN on the CCL, provided General Prohibitions Four, Five, Six, Seven, Nine, or Ten do not apply. Such items are classified EAR99. Second~~ly~~, certain items are listed on the CCL but do not require a license for export to all destinations under General Prohibition One (Exports and Reexports ~~in the Form Received~~), Two (~~Parts and Components~~ U.S. Content Reexports), ~~or~~ Three (Foreign-Produced Direct Product Reexports), or Eight (Intransit) (736.2(b)(1), (b)(2), ~~or~~ (b)(3), or (b)(8) of the EAR). Such items do not have an "x" in the ~~appropriate~~ cell(s) in the applicable column(s) on the Country Chart for the country of ultimate destination. ~~If General Prohibitions Four through Ten (736.2(b)(4) of the EAR through (b)(10) of the EAR) also do not apply,~~ When such an export requires a SED, you must ~~clear exports of such items by~~ enter ~~ing~~ the symbol "NLR" in the appropriate place on the SED.

732.5(a)(2):

. . . In the case of License Exceptions LVS, GBS, and CIV and NLR exports of items controlled for national security reasons, the ECCN of the item being exported must also be entered when an SED is required.

(For consistency with 758.3(h)(2))

732.5(b):

Step 28: Destination Control Statement. ~~You~~ Exporters are required to enter ~~an appropriate~~ Destination Control Statement (DCS) on commercial documents in accordance with the DCS requirements of 758.6 and 752.15(b) of the EAR.

732.5(c):

Step 29: Recordkeeping. Records of transactions involving exports, reexports, or other activities under any license , NLR shipment, or License Exception must be maintained in accordance with the recordkeeping requirements of part 762 of the EAR and other parts of the EAR referenced in part 762.

734.1(a):

. . . If your ~~item~~ export, reexport, or other activity . . . If you already know that your ~~item~~ export, reexport, or other activity . . . Specifically it includes the following terms: "subject to the EAR," "~~items~~ exports or reexports subject to the EAR," "export," ~~and~~ "reexport", and "other activities subject to the EAR." . . .

734.2(a)(1):

. . . ~~items and~~ exports, reexports, or other activities (three times) . . . an ~~item~~ export, reexport, or other activity (twice)

734.2(a)(2):

~~Items and~~ Exports, reexports, or other activities subject to the EAR under some circumstances may ~~also~~ be controlled under export-related programs administered by other agencies under other circumstances. ~~Items and activities subject to the EAR are not necessarily exempted from the control programs of other agencies. Although BXA and other agencies that maintain controls for national security and foreign policy reasons try to minimize overlapping jurisdiction, you should be aware that in some instances you may have to comply with more than one regulatory program.~~ To avoid duplication in licensing procedures, the Department of Commerce will not require a separate license for transactions licensed by another department of agency.

(For consistency with sound administrative practice)

734.2(b)(1):

"Export" means an actual shipment or transmission ~~of items subject to the EAR~~ out of the United States; or release of technology or software ~~subject to the EAR~~ to a foreign national in the United States . . .

734.2(b)(2):

(i) Any release of technology or software subject to the EAR by a person subject to U.S. jurisdiction to a foreign national in a foreign country; or

(ii) Any release of technology or source code subject to the EAR by a person subject to U.S. jurisdiction to a foreign national. . . . This deemed export rule does not apply to release to persons lawfully admitted for permanent residence in the United States and does not apply to release to persons who are protected individuals under the Immigration and Naturalization Act . . .

(Presmably it is not intended to control transfer of foreign-origin technology in a foreign country by one foreign national to another foreign national)

734.2(b)(4):

"Reexport" means an actual shipment or transmission ~~of items~~ subject to the EAR from one foreign country to another foreign country; or release of technology or software subject to the EAR to a foreign national outside the United States . . .

734.2(b)(5):

Any release of technology or source code subject to the EAR by a person subject to U.S. jurisdiction to a foreign national ~~of~~ in another country . . . However, this deemed reexport definition does not apply to release to persons lawfully admitted for permanent residence in the United States. . . .

734.2(b)(6):

. . . the export or reexport ~~of items~~ subject to the EAR . . .

734.2(b)(7):

. . . the export or reexport ~~of items~~ subject to the EAR . . .

734.2(b)(8):

Export or reexport ~~of items~~ subject to the EAR . . .

734.3 ~~Items~~ Exports or reexports subject to the EAR.

(a) Except ~~for items excluded~~ as specified in paragraph (b) of this section, the following ~~items~~ exports or reexports are subject to the EAR:

(1) ~~All items in the United States~~ Exports of U.S.-origin or foreign-origin items from the United States, including ~~in~~ from a U.S. Foreign Trade Zone or moving intransit through the United States from one foreign country to another;

(2) ~~All~~ Reexports of U.S.-origin items ~~wherever located~~;

(3) Reexports of U.S.-origin ~~parts, components, materials or other~~ commodities, other than those controlled for ~~short supply reasons,~~ incorporated abroad into foreign-made products, U.S.-origin software commingled with foreign software, ~~and~~ or U.S.-origin technology commingled with foreign technology, ~~in quantities exceeding levels as described in 734.4 and Supplement No. 2 of this part~~ if both the foreign-made product, foreign software, or foreign technology and the U.S. content would require a license to the country of ultimate destination.

(4) Reexports of ~~Certain~~ foreign-made direct products of U.S.-origin technology or software~~,~~ as described in 736.2(b)(3) of the EAR. . . .

(5) Reexports of ~~Certain~~ commodities produced by any plant or major component of a plant located outside the United States that is a direct product of U.S.-origin technology or software~~,~~ as described in 736.2(b)(3) of the EAR.

(6) Reexports to Rwanda or Serbia & Montenegro of foreign-origin items specified in 746.8(b)(1)(i) or (ii) or 746.9(a)(1), if the reexport is by a "United States person" as defined in 746.8(b)(3)(ii).

(7) Reexports of foreign-origin items by a "U.S. person" as defined in 744.6(c) if the conditions of 744.6(a)(1) or 744.6(b) are met.

(8) Reexports of foreign-origin items as described in Export Administration Act sections 11A, 11B, or 11C or the Nuclear Proliferation Prevention Act of 1994 (22 USC 3201).

(b) The following ~~items~~ exports or reexports are not subject to the EAR:

(1) ~~Items~~ Exports or reexports that are ~~exclusively~~ controlled ~~for export or reexport~~ by ~~the following~~ other departments ~~and~~ or agencies of the U.S. Government ~~which regulate exports or reexports for national security or foreign policy purposes:~~

~~(i) (v) . . .~~.

(2) Exports or reexports of ~~P~~prerecorded phonograph records . . .

(3) Exports or reexports of ~~P~~publicly available technology ~~and~~ or software that: . . . However, notwithstanding 734.3(b)(2) and 734.3(b)(3), encryption source code in electronic form or media (e.g., computer diskette or CD ROM) remains subject to the EAR ~~(see 734.3(b)(3))~~ as does information used in performing activities described in 744.6(a)(1)(ii), (a)(2), or (a)(3).

(4) ~~Foreign made items that have greater than *de minimis*~~ Reexports of U.S. content incorporated in, or commingled with, a foreign-made item not exceeding the *de minimis* levels ~~based on the principles described specified~~ in 734.4 of this part and Supplement No. 2 to part 734.

(5) Shipments in transit through the United States without unloading provided they are not originally manifested to the United States.

(6) Shipments of items of foreign origin for which no customs entry has been made exported from a U.S. foreign trade zone, except that the following are subject to the EAR unless shipped from Canada moving in transit through the United States to any foreign destination:

(a) Items controlled for national security, missile technology, nuclear proliferation, or chemical and biological weapons reasons shipped to countries marked with a CIV footnote following the "x" in NS Column 3 or an "x" in MT Column 2, NP Column 2, or CB Column 3 (see Supplement No. 1 to part 738), respectively;

(b) Items exported to Cuba, Libya, or North Korea;

(c) Commodities shipped to the United States under an International Import Certificate, Form BXA-645P;
(d) Chemicals controlled under ECCN 1C350;
(e) Horses for export by sea (refer to short supply controls in part 754 of the EAR).

(7) Exports for the U.S. Armed Forces shipped under a U.S. Government Bill of Lading or a U.S. Government space charter or by means of a U.S. Government-owned or Government-chartered carrier.

(8) Exports for consumption in Canada not requiring a license for export to Canada.

(Reference to 744.6 in 734.3(b)(3) is for consistency with 732.2(b)(1)); proposed 734.3(b)(5) is for consistency with 770A.5; proposed 734.3(b)(6) is for consistency with 740.9(b)(1); proposed 734.3(b)(7) is for consistency with 770A.3(a)(2); proposed 734.3(b)(8) is for consistency with 740.9(b)(1)(iv))

734.4(a) There is no *de minimis* level for the ~~export from a foreign country of a foreign made computer exceeding 20,000 MTOPS containing~~ reexport of U.S.-origin controlled semiconductors (other than memory circuits) classified under ECCN 3A001 or high speed interconnect devices (ECCN 4A003.g) incorporated in a foreign-made computer exceeding 20,000 mtops to Computer Tier 3 and 4 countries . . .

734.4(b) There is no *de minimis* level for the reexport of ~~foreign-origin~~the following U.S.-origin items incorporated in, or commingled with, foreign-made items ~~that incorporate~~:

(1) "~~i~~Information security" systems and equipment, cryptographic devices, software and components specifically designed or modified therefor, and related technology controlled for "EI" reasons under ECCNs 5A002, 5D002, ~~and~~ or 5E002;. ~~Certain mass market encryption commodities, software and technology controlled under 5A992,~~ 5D992, or 5E992 may be eligible for *de minimis* (refer to 742.15(b)(1)).

(742.15(b)(1) contains nothing to indicate such eligibility)

~~(1)~~(2) Items controlled by ECCN 9A004.a; or

(2) ~~"Information security" systems and equipment, cryptographic devices, software and components specifically designed or modified therefor, and related technology conrolled for "EI" reasons under ECCNs 5A002, 5D002 may become eligible for *de minimis* only after a one time BXA review (refer to 742.15(b)(1)).~~
(742.15(b)(1) contains nothing to indicate such eligibility)

(3) Technology and source code used to design or produce foreign-made commodities or software.

734.4(c) Except as provided in ~~paragraph (a)~~ paragraphs (a) or (b) of this section ~~for certain computers~~ . . .

(1) Reexports of ~~a foreign made commodity incorporating~~ controlled U.S.-origin commdities incorporated in a foreign-made commodity if the U.S. content is valued at 10% or less of the total value of the foreign-made commodity

(2) Reexports of ~~foreign made software incorporating~~ controlled U.S.-origin software commingled with foreign software if the U.S. content is valued at 10% or less of the total value of the foreign ~~made~~ software; or

(3) Reexports of ~~foreign~~ U.S.-origin technology commingled with foreign technology ~~or drawn from~~ if the controlled U.S.-origin technology is valued at 10% or less of the total value of the foreign technology.

734.4(d) Except as provided in ~~paragraph (a)~~ paragraphs (a) or (b) of this section ~~for certain computers~~, for all other countries not included in paragraph ~~(b)~~(c) of this section the following reexports are not subject to the EAR:

(1) Reexports of ~~a foreign made commodity incorporating~~ controlled U.S.-origin commodities incorporated in a foreign-made commodity if the U.S. content is valued at 25% or less of the total value of the foreign-made commodity

(2) Reexports of ~~foreign made software incorporating~~ controlled U.S.-origin software commingled with foreign software if the U.S. content is valued at 25% or less of the total value of the foreign ~~made~~ software; or

(3) Reexports of ~~foreign~~ U.S.-origin technology commingled with foreign technology ~~or drawn from~~ if the controlled U.S.-origin technology is valued at 25% or less of the total value of the foreign technology.

~~734.4(c) For purposes of determing de minimis levels, technology and source code used to design or produce foreign made commodities or software are not considered to be incorporated into such foreign made commodities or software. Commodities subject only to short supply controls are not included in calculating U.S. content.~~

734.5 Other ~~A~~activities ~~of U.S. and foreign persons~~ subject to the EAR

In addition to exports or reexports described in 734.3, ~~T~~the following ~~kinds of~~ other activities are subject to the EAR, unless controlled by another Federal agency:

(a) ~~Certain~~ aActivities . . .

(b) Activities of U.S. or foreign persons prohibited by an order issued under the EAR, including a Denial Order issued pursuant to ~~part 766~~ 764.3(a)(2), 766.24(a), or 766.25(a).

(c) . . .

(d) Conduct described in 764.2.

(e) Use by any person of a U.S.-registered aircraft or vessel to supply or transport to Rwanda or to Serbia & Montenegro any of the items described in 746.8(b)(1)(i) or (ii) or 746.9(a)(i) or (ii) regardless of origin

734.6:

(a) If you are not sure whether ~~a commodity, software, technology,~~ an export, reexport, or other activity is subject to the EAR, . . . determination whether a particular ~~item~~ export, reexport, or other activity is subject to the EAR. . . . the ~~item~~ transaction may fall under the licensing jurisdiction of the Department of State and ~~may~~ therefore be subject to the controls of the International Traffic in Arms Regulations . . . if the Department of State has licensing jurisdiction over the export or reexport of an item . . .

(b) . . . determining whether an ~~item~~ export, reexport, or other activity is subject to the EAR . . .

734 Supplement No. 2 (a)(1)(ii) add at end:

. . . and do not include short supply items or items for which which a license is not required for reexport to Iran, Syria, or Sudan (see 742.8(a)(2), 742,9(b)(1)(iv) last sentence, and 742.10(a)(2))

734 Supplement No. 2 (a)(4):

. . . ~~the classification of a foreign made item is irrelevant in determining the scope of the EAR,~~ . . .

736.1 intro:

. . . A person may undertake transactions subject to the EAR without a license or other authorization, unless the regulations ~~affirmatively~~ state such a requirement. ~~As such, i~~If an export, reexport, or activity is subject to the EAR, the general prohibitions contained in this part, No License Required (NLR) provisions based on the Country Chart in part 738), and the License Exceptions specified in parts 740, 744, 746, and 754 of the EAR must be reviewed to determine if a license is necessary. In the case of all exports from the United States subject to the EAR, you must keep records ~~document your export~~ as described in part 762 of the EAR ~~regarding recordkeeping~~ and clear your export through the U.S. Customs Service or the U.S. Post Office as described in part 758 of the EAR ~~regarding export clearance requirements~~. Also note that for short supply controls ~~all~~ additional prohibitions and License Exceptions are in part 754 of the EAR.

(Re suggested deletion of "affirmatively," many requirements are defined using negative terminology, *e.g.*, not subject to the EAR, No License Required, and License Exceptions)

736.1(a)(1):

The facts that make your proposed export, reexport, or ~~conduct~~ other activity subject to these general prohibitions, and

736.1(c):

If you violate any of these ten general prohibitions ~~or engage in conduct contrary to the Export Administration Act, the~~

~~EAR, or any order, license, License Exception, or authorization issued thereunder, as described in part 764 of the EAR regarding enforcement~~, you will be subject to the sanctions described in ~~that~~ part 764.

(Revision of General Prohibition Nine suggested below in 736.2(b)(9) would expand the ten general prohibitions to cover all, not just part, of the list of actions constituting violations contained in part 764)

736.2(a):

. . .

(3) ~~End-user~~ Denial Orders. The ~~ultimate end-user~~ terms of denial orders (see General Prohibition Four (paragraph (b)(4) of this section) and parts ~~744 and~~ 764 of the EAR for ~~a reference to the list of persons you may not deal with~~ your responsibilities in connection with denial orders;

(4) End-use and end-user. The ultimate end-use and end-user (see General Prohibition Five (paragraph (b)(5) of this section) and part 744 of the EAR for general end-use and end-user restrictions); and

(5) ~~Conduct~~ Activity. ~~Conduct~~ Activity such as contracting, financing, and freight forwarding in support of a proliferation project (see General Prohibition Seven (paragraph (b)(7) of this section) and ~~as described in~~ part ~~744~~ 744.6 of the EAR for activity restrictions);

(6) Violation. (See General Prohibitions Four, Nine, and Ten (paragraphs (b)(4), (b)(9), and (b)(10) of this section) and part 764.2 of the EAR for a description of violations).

736.2(b) intro:

. . . The License Exceptions at part 740 of the EAR apply ~~only~~ generally to General Prohibitions One (Exports and Reexports ~~in the Form Received~~), Two (~~Parts and Components~~ U.S. Content Reexports), ~~and~~ Three (Foreign-Produced Direct Product Reexports), and Eight (Intransit)~~; however, selected~~. These License Exceptions apply to Prohibition Six (Embargo) if they are specifically referenced and authorized in part 746 of the EAR ~~concerning embargo destinations~~. They also apply to Prohibition Five (End-Use End-User) pur-

suant to specific references ~~and~~ in 744.2(c) of the EAR regarding two parts of License Exception TSU for nuclear end-uses; in 744.7(b) of the EAR concerning U.S. and Canadian carrier end-uses; in 732.3(h)(2) concerning three parts of License Exception TSU; and in 744.11(b) and 744.12(b) concerning portions of License Exceptions TMP, RPL, and AVS for aviation safety.

736.2(b)(2)

General Prohibition Two — Reexport ~~and export from abroad~~ of U.S.-origin items incorporated in, or comingled with foreign-made items ~~incorporating more than a de minimis amount of controlled U.S. content (Parts and Components Reexports)~~ (U.S. Content Reexports)

(i) You may not, without a license or License Exception, ~~export~~ reexport ~~or export from abroad~~ any ~~foreign made commodity, software, or technology incorporating~~ U.S.-origin commodities~~, software, or technology, respectively,~~ incorporated in any foreign-made commodity, U.S.-origin software commingled with foreign software, or U.S.-origin technology commingled with foreign technology, ~~that is controlled to the country of ultimate destination~~ if ~~the foreign made item meets~~ all three of the following conditions are met:

(A) ~~It incorporates more than~~ The controlled U.S. content exceeds the *de minimis* amount ~~of controlled U.S. content, as~~ defined in 734.4 and 734 Supplement No. 2 of the EAR concerning the scope of the EAR;

(B) ~~It~~ The foreign-made commodity, foreign software, or foreign technology is controlled for a reason indicated in the applicable ECCN; and

(C) ~~Its export~~ The reexport of the foreign-made commodity, foreign software, or foreign technology to the country of destination requires a license for that control reason as indicated on the Country Chart (The scope of this prohibition is determined by the correct classification of ~~your~~ the U.S. content and of the foreign-~~made~~ item and the ultimate

destination, as that combination is reflected on the Country Chart.)

(ii) Each License Exception described at part 740 of the EAR supersedes General Prohibition Two if all terms and conditions of a given License Exception are met by the ~~exporter or~~ reexporter.

736.2(b)(3):

General Prohibition Three — Reexport ~~and export from abroad~~ of U.S.-origin technology or software in the form of the foreign-produced direct product of ~~U.S.~~ that technology ~~and~~ or software (Foreign-Produced Direct Product Reexports).

(i) Country scope of prohibition. You may not ~~export,~~ reexport~~, or export from abroad items~~ technology or software subject to the scope of this General Prohibition Three to . . .

(ii) Product scope of ~~foreign made items subject to~~ prohibition. This General Prohibition ~~3~~ Three applies if ~~an item~~ the foreign-produced product meets either the Conditions defining the direct product of technology or software in paragraph (b)(3)(ii)(A) of this section or the Conditions defining the direct product of a plant in paragraph (b)(3)(ii)~~(A)~~(B) of this section:

(A) Conditions defining direct product of technology or software. ~~Foreign made items are subject to t~~This General Prohibition ~~3~~ Three applies if ~~they~~ the foreign-made items meet both of the following conditions: . . .

(B) Conditions defining direct product of a plant. ~~Foreign made items are also subject to t~~This General Prohibition ~~3~~ Three also applies if ~~they~~ the foreign- made items . . .

736.2(b)(4)(i):

~~You~~ Neither the denied party nor any other person subject to U.S. jurisdiction may ~~not~~ take any action that is prohibited by a denial order issued under ~~part 766~~ 764.3(a)(2), 766.24(a), or 766.25(a) of the EAR~~, Administrative Enforcement Proceedings~~. These orders prohibit many actions in

addition to direct exports by the person denied export privileges, including some transfers within a single country either in the United States or abroad by other persons. The denied party is responsible for adhering to the order addressed to that party. ~~You~~ Other persons subject to U.S. jurisdiction are responsible for ensuring that any of ~~your~~ their transactions in which a person who is denied export privileges is involved do not violate the terms of the order. . . . See ~~764.3(a)(3)~~ 764.3(a)(2), 766.24(a), and 766.25(a) of the EAR.

736.2(b)(4)(ii) Option 1:

There are no License Exceptions described in parts 740, 744, 746, or 754 of the EAR that authorize conduct either by the denied party or by other persons prohibited by this General Prohibition Four and the lack of an indication of a license requirement on the Country Chart at part 738 of the EAR does not authorize conduct prohibited by this General Prohibition Four, unless BXA, on an exceptional basis, has permitted such conduct.

736.2(b)(4)(ii) Option 2:

There are no License Exceptions described in parts 740 , 744, 746, or 754 of the EAR that authorize conduct either by the denied party or by other persons prohibited by this General Prohibition Four, unless BXA, on an exceptional basis, has permitted such conduct.

736.2(b)(4)(ii) - Option 3:

~~There are no License Exceptions described in part 740 of the EAR that authorize conduct prohibited by this~~ General Prohibition Four applies to the involvement of a denied party in an export or reexport transaction which requires a license.

(EAR parts 764 and 766 are unclear as to which of these options is intended)

736.2(b)(5) add:

The following License Exceptions apply to General Prohibition Five: the portions of TSU described in 740.13 (a,b,c); the portions of AVS described in 740.15(c) and 744.7(b), and

the portions of TMP, RPL and AVS described in 744.11(b) and 744.12(b).

736.2(b)(6):

(i) You may not, without a license or License Exception or no license required authorized under part 746, . . .

(ii) License Exceptions and no license required to this General Prohibition Six . . .; and unless a License Exception or no license required is authorized in part 746 of the EAR, the License Exceptions at part 740 of the EAR and the no license required provisions elsewhere in the EAR are not available . . .

(746.4(b)(2)(i) describes NLR for specified items to Libya)

736.2(b)(7):

If you are a U.S. Person as that term is defined at 744.6(c) of the EAR, you may not engage in any activities prohibited by 744.6 ~~(a)~~ (a)(1)(ii), (a)(2), (a)(3), or (b) of the EAR , which prohibits the performance, without a license from BXA, of certain financing, contracting, service, support, transportation, freight forwarding, ~~or~~ employment , or participation in the design, construction, export, or reexport of a plant that you know will assist in certain proliferation activities described further at part 744 of the EAR or of unspecified activities which BXA may inform you could involve such types of participation or support. . . . There are no License Exceptions to this General Prohibition Seven ~~in part 740 of the EAR unless specifically authorized in that part.~~

(744.6(a)(i) is a requirement based on General Prohibition Five, rather than on General Prohibition Seven)

736.2(b)(8):

General Prohibition Eight — In transit shipments and items to be unladen from vessels or aircraft (Intransit).

(ii) . . . Moldova, . . .

736.2(b)(9):

General Prohibition Nine — Other Violations ~~of any order, terms, and conditions (Orders, Terms, and Conditions). You may not violate terms or conditions of a license or of a~~

~~License Exception issued under or made a part of the EAR, and you may not violate any order issued under or made a part of the EAR~~ Violations described in 764.2.a-d, and f-j are prohibited.

736.2(b)(10) add:

In the context of this General Prohibition Ten, "violation" means a violation of one of the other nine General Prohibitions.

738.1(a):

. . . ~~The CCL does not include these~~ Commerce does not administer controls on items ~~exclusively~~ controlled for export or reexport by another department or agency of the U.S. Government. The Treasury Department controls all CCL-listed items for some types of transactions to Cuba, North Korea, Libya, Iran, Iraq, Sudan, Serbia less Kosovo, and Taliban-controlled areas of Afghanistan and specified CCL-listed items to UNITA (Angola). In other instances where ~~agencies other than the Department of Commerce~~ the Department of State, the Nuclear Regulatory Commission, or the Department of Energy administer controls over ~~related~~ CCL-listed items, entries in ~~the CCL~~ those items contain a reference to these controls.

738.2(d)(1):

. . .

0: National Security ~~reasons~~ (including Wassenaar Dual Use List items and ~~International~~ those Wassenaar Munitions List items not on the U.S. Munitions List) and ~~Items on the NSG Dual Use Annex and~~ IAEA Trigger List
1: Missile Technology ~~reasons~~
2: Nuclear ~~Nonproliferation reason~~ Suppliers Group Dual Use and related unilateral
3: Chemical and Biological Weapons ~~reasons~~
9: Anti-terrorism, Crime Control, ~~Regional Stability~~ Short Supply, UN Sanctions, etc.

(i) Since Reasons for Control are not mutually exclusive, numbers are assigned in order of precedence. As an example, if an item is controlled for both National Security and Missile

Technology or Nuclear Proliferation reasons, the entry's ~~third~~ second digit will be a "0". If the item is controlled only for Missile Technology or only for Missile Technology and Nuclear Proliferation, the ~~third~~ second digit will generally be "1". However, some software and technology items combine coverage only for National Security, coverage for both National Security and Missile Technology or Nuclear Nonproliferation, and coverage for only Missile Technology or Nuclear Nonproliferation in one item with a second digit "0". Since all Regional Stability items are also controlled for National Security reasons, no item is assigned a distinctive Regional Stability number.

(ii) The numbers "9" in either the second or third digit (e.g., ~~3A001~~ 1A984 or 2B290) serves to differentiate between multilateral and unilateral entries. An entry with the number "9" as the second digit and an "8" or a "9" as the third digit identifies the ~~entire~~ entry as not only unilaterally controlled but also controlled for a unilateral ~~concern~~ reason (e.g., 1A984 for a unilateral crime control reasons or 2B991 for a unilateral anti-terrorism reasons). If the number "9" appears as the third digit but not as the second digit, the item is controlled ~~for unilateral purposes based on a proliferation concern~~ unilaterally but for a multilateral reason (e.g., 2A292 is controlled ~~for unilateral purposes~~ unilaterally but based on multilateral nuclear nonproliferation concerns). If the number "9" appears as the second digit but not as the third digit, the item might be either multilaterally or unilaterally controlled (e.g., 1A988 UN multilateral controls to Rwanda; 1C980 unilateral short supply reason; or 5A980 unilateral communications intercept reason).

(iii) The last ~~digit within each entry (e.g., 3A001) is used for the sequential numbering of ECCNs to differentiate between entries on the CCL~~ two digits identify the individual item. National Security dual-use items are numbered from 01 to 12. International Munitions List items are numbered 18. Missile Technology or Nuclear Nonproliferation dual use items which are closely related to National Security dual-use items use the same last two digits (e.g., 1A002, 1A102, and 1A202). Missile Technology items unrelated to National

Security items are numbered 15 and higher (e.g., 1B115). Nuclear Nonproliferation dual use items closely related to such a Missile Technology item use the same last two digits (e.g., 1C116 and 1C216). Nuclear Nonproliferation dual use items unrelated to either National Security or Missile Technology are numbered 25 and higher (e.g., 1A225). Chemical or Biological Weapons items are numbered 50 and higher (e.g., 1C350). Unilateral items are numbered 80 and higher.

738.2(d)(2)(i)(A):

The "Controls" header identifies all applicable Reasons for Control ~~in order of restrictiveness,~~ and to what extent each applies (e.g., to the entire entry or only to ~~certain subparagraphs~~ a specified portion). ~~Those requiring licenses for a larger number of countries and/or items are listed first. As you read down the list the number of countries and/or items requiring a license declines.~~ Since Reasons for Control are not mutually exclusive, items controlled within a particular ECCN may be controlled for more than one reason. The following is a list of all possible Reasons for Control, in the order in which they are listed in ECCNs, where applicable:

~~AT Anti Terrorism~~
~~CB Chemical & Biological Weapons~~
~~CC Crime Control~~
~~CW Chemical Weapons Convention~~
~~EL Eneryption Items~~
~~FC Firearms Convention~~
~~MT Missile Technology~~
~~NS National Security~~
~~NP Nuclear Nonproliferation~~
~~RS Regional Stability~~
~~SS Short Supply~~
~~XP Computers~~

NS National Security
EI Encryption Items
MT Missile Technology
NP Nuclear Nonproliferation
CB Chemical & Biological Weapons
CW Chemical Weapons Convention

RS Regional Stability
CC Crime Control
AT Anti-Terrorism
UN United Nations (Rwanda)
FC Firearms Convention
SS Short Supply
XP Computers
SI Significant Item (transferred from USML)
CI Communications Intercept
EM Embargo

738.3(a):

. . . ~~There are only two instances where~~ For a few unique entries, the chart cannot be used for this purpose.

~~(1) Items controlled for short supply reasons . . .~~

~~(2) Unique entries. The following are unique entries where you do not need to consult the Country Chart to determine whether a license is required~~

~~(i) ECCNs 0A983 and 5A980. . . .~~

~~(ii)~~ ECCNs 0A986, 0A988, 0B986 require a license only to Rwanda, Serbia & Montenegro, and embargoed countries and ~~1A005~~ 2A994, 2D994, and 2E994 require a license only to Iran and other embargoed countries. ~~A license is required for items controlled under these entries only to the specific countries identified within each entry.~~

(The country chart can easily be used for short supply, 0A983, and 5A980 by adding a column with an "X" for every country including Canada. 1A005 presents no problem, because the special control to Rwanda and Serbia & Montenegro is subsumed by a national security control. The only specific countries identified within 0A986, 0A988, and 0B986 are Rwanda and Serbia & Montenegro; but it is undoubtedly intended to control these items to embargoed countries as well.)

738.2(d)(2)(ii) . . . ~~ECCN driven~~ specified (three times) . . . Other License Exceptions~~, not based on particular ECCNs,~~ may be available.

(Several License Exceptions not mentioned in ECCNs are also ECCN-driven, e.g., KMI and ENC eligibility for 5A002 and 5D002; transit through U.S. portion of TMP ineligibility for 1C350; aircraft on temporary sojourn portion of AVS applicability only to 9A991; SPR, SS-SAMPLE, and TAPS applicability only to 1C981; WRC applicability only to 1C988)

738.3(a):

. . . ~~There are~~ The only ~~two~~ instances where the chart cannot be used for this purpose are

~~(1) Items controlled for short supply reasons . . .~~

~~(2) Unique entries . . .~~

~~(i) ECCNs 0A983 and 5A980 . . .~~

~~(ii)~~ ECCNs 0A986, 0A988, 0A989, 0B986, 1C355, 1C991, 1C995, 1C998 2A994, 2D994, and 2E994. A license is required for items controlled under these entries only to the specific countries identified within each entry.

(The Country Chart can easily be used for short supply items, 0A983 and 5A980 by addition of a column with an "x" for every country, including Canada.

The ECCNs for which the Country Chart cannot easily be used are those which are marked in the CCL as requiring a license only for a few countries for which three new columns would be required: one only for Serbia & Montenegro (0A989 and 1C998), one only for Rwanda and Serbia & Montenegro (0A986, 0A988, and 0B986}, and one only for Cuba, Iran, Libya, and North Korea (1C991, 1C995, 2A994, 2D994, and 2E994). It is probably intended that the first two groups of unique ECCNs also require a license to Cuba, Libya, North Korea, Iran, Iraq, and Sudan and that the third group also require a license to Iraq and Sudan, even though they do not now state such additional license requirements.)

738.3(a)(2)(i) . . . No License Exceptions apply, except the U.S. Government portion of GOV for ECCN 5A980 per 740.2(a)(3)

738.4(a)(2)(ii)(A) . . . ~~ECCN driven~~ specified . . . Note that other License Exceptions ~~, not related to the CCL,~~ may also apply . . .

738.4(a)(2) add:

(iii) Some software or technology ECCN's are marked NS Column 1 TSR.

(A) To export software without a license to a country for which the "x" in NS Column 1 is marked with a TSR footnote, the exporter must have received from the importer a written assurance that, without a BXA license or a License Exception, the importer will neither:

(1) Reexport or release the software or the source code for the software to a national of a country with an "x" in NS Column 3; nor

(2) Reexport to a country with an "x" in NS Column 3 the direct product of the software, if such foreign-produced direct product is subject to national security controls as identified on the CCL. (See General Prohibition Three, 736.2(b)(3) of the EAR).

(B) To export technology without a license to a country for which the "x" in NS Column 1 is marked with a TSR footnote, the exporter must have received from the importer a written assurance that, without a BXA license or a License Exception, the importer will not:

(1) Reexport or release the technology to a national of a country with an "x" in NS Column 3;

(2) Reexport to a country with an "x" in NS Column 3 the direct product of the technology, if such oreign-produced direct product is subject to national security controls as identified on the CCL. (See General Prohibition Three, 736.2(b)(3) of the EAR); or

(3) If the direct product of the technology is a complete plant or any major component of a plant, export to a country with an "x" in NS Column 3 the direct product of the technology, if such foreign-produced direct product is subject to national security controls as identified on the CCL or is subject to State Department controls under the U.S. Munitions List (22 CFR part 121).

(C) Form of written assurance. (text from 740.6(a)(3) revised as follows):

. . . If such a written assurance is not received, ~~License Exception TSR is not~~ NS column 1 without the TSR footnote is applicable and a license is required to export to any country with an "x" in NS column 1. . . .

(Replacing TSR with NLR, as above, would be consistent with 738.3(a))

738.3(b):

. . . For example, if your destination is the ~~Cayman~~ Channel Islands of Jersey or Guernsey, a dependent territory of the United Kingdom, consult the United Kingdom on the Country Chart for licensing requirements.

(A few years ago Commerce considered the Cayman Islands to be independent of the United Kingdom for export control purposes; but Commerce has consistently regarded the Channel Islands as part of the UK for export control purposes)

738.4(b)(2):

. . .

NS applies to entire entry NS Column ~~2~~ 3

. . .

~~AT applies to entire entry~~ ~~AT Column 1~~

LVS: ~~$5,000~~ N/A

~~GBS: Yes~~

~~CIV: N/A~~

. . .

(LVS is an empty box to the extent that GBS also applies, because the same countries are eligible for both and GBS is not limited by dollar value)

738.4(b)(3):

. . . I read that the entire entry is controlled for national security ~~and anti terrorism~~ reasons. . . . I note that the appropriate Country Chart column identifiers ~~are NS Column 2 and AT Column 1~~ is NS Column 3. Turning to the Country Chart, I locate my specific destination, India, and see that ~~an~~ no "x" appears in the NS Column ~~2~~ 3 cell for India, ~~but not in the AT Column 1 cell~~ which is the only applicable Country

Chart license requirement. I understand that a license is not required on the basis of the Country Chart (General Prohibition One — 736.2(b)(1)), ~~unless my transaction qualifies for a License Exception or Special Comprehenisve License. From the License Exception LVS value listed in the entry, I know immediately that my proposed transaction exceeds the value limitation associated with LVS.~~ LVS non-availability is of no concern, because GBS eligibility applies to the same countries with no dollar value limit. ~~Noting that License Exception GBS is "Yes" for this entry. I turn to part 740 of the EAR to review the provisions related to use of GBS.~~ But no License Exception need be found, because a license is not required based on the Country Chart. However, before concluding that you may export without a license, you must review the other nine General Prohibitions in 736.2(b)(2) through (10). General Prohibitions Two and Three are not applicable, because no foreign-made or foreign-produced product is involved. General Prohibition Four would be applicable if a denied party were involved in the transaction. General Prohibitions Five or Seven would be applicable if the transaction were subject to an end-use/end-user or U.S. person proliferation activity control described in part 744. General Prohibition Six is not applicable, because the transaction does not involve any of the countries to which footnote 1 in the Country Chart applies (Angola, Cuba, Iran, Iraq, North Korea, Libya, Rwanda, Serbia & Montenegro, Sudan, or Syria). General Prohibition Eight would apply if your commodity was to be unladen in one of the countries listed in 736.2(b)(8). General Prohibitions Nine and Ten would not apply because you have no knowledge of a violation in connection with the transaction. Therefore, you do not need a license unless a denied party is involved, a control described in part 744 is applicable, or your shipment would transit a country listed in 736.2(b)(8).

738 Supplement No. 1:

Delete CC Column 3

(Commerce certainly does not intend to cover part of 0A984 and 0E984 more restrictively to countries not of concern than to countries of concern)

Combine NS Column 1, MT Column 1, CB Column 1, & RS Column 1

(All these columns show "x" for all countries except Canada)

Combine RS Column 2 and CC Column 1

(Countries with an "x" are identical in these two columns)

Add NS Column 3, which would have an "x" for each country in Country Group D:1 from 740 Supplement 1 plus an "x" for Cuba, Iran, Iraq, North Korea, Libya, Serbia less Kosovo, Sudan, Syria, and Taliban-controlled areas of Afghanistan. The "x" for each country in Country Group D:1 would be footnoted as follows:

If NS Column 3 is marked CIV in an ECCN License Requirement section, the "x" applies only to military end-uses or end-users. Reference to this footnote is also made to identify countries subject to special restrictions not related to the Country Chart.

(This would permit conversion of GBS and CIV to NLR, for consistency with 738.3(a))

Footnote the "x" in NS Column 1 for each country other than those with an "x" in NS Column 3, as follows: If NS Column 1 is marked TSR in an ECCN License Requirement section, the "x" for this country does not apply provided that (text of TSR written assurance requirement).

(This would permit conversion of TSR to NLR, for consistency with 738.3(a))

Combine NS Column 3 and CC Column 2

Add MT Column 2, which would have an "x" for each country in Country Group D:4, footnoting them selectively as is now done in D:4.

Add EM Column 1, which would have an "x" for Cuba, Libya, and North Korea and a footnote 1 indicator for these countries plus Iran, Iraq, Sudan, Serbia less Kosovo, and Taliban-controlled areas of Afghanistan (see below for footnote 1 text).

Add a combined SS Column 1 CI Column 1, and CC Column 4, which would have an "x" for every country, including Canada, and would be applicable to each short supply ECCN, 5A980, and 0A983.

Re-order the columns in the approximate order of the number of countries marked with x's:

1. SS 1, CI 1, CC 4
2. NS 1, MT 1, CB 1, RS 1
3. RS 2, CC 1
4. NS 2
5. NP 1
6. CB 2
7. NS 3, CC 2
8. MT 2
9. NP 2
10. CB 3
11. CW 1
12. FC 1
13. AT 1
14. AT 2
15. EM 1

For Cuba, Iran, North Korea, and Libya: put an "x" in each column, and delete the text now in the columns.

Add footnote 1 after the country names for Cuba, Iran, North Korea, Libya, Serbia less Kosovo, Sudan, and Taliban-controlled areas of Afghanistan; delete footnote 1 from Rwanda; retain footnote 1 for Angola, Iraq, and Serbia & Montenegro; and revise the text of footnote 1 to read:

> See part 746 of the EAR for which types of transactions are subject to the EAR and which are subject to the export licensing authority of the Treasury Department, Office of Foreign Assets Control.

Renumber footnote 2 to become 3. A license is required ~~for~~ only for computers controlled by ~~4A001,~~ 4A002 ~~and~~ or 4A003 . . .

Add footnote 2 after the country names for Angola, ~~Bosnia & Herzegovina, Croatia,~~ and Rwanda and add a new footnote 2 to read:

> See part 746 of the EAR for additional license requirements.

Delete Liechtenstein, San Marino, and Vatican City

Add the following countries and put "x's" in the same columns as Antigua & Barbuda:

Anguilla
Bermuda
British Indian Ocean Territories
British Virgin Islands
Caymans
Faeroe Islands
French Guiana
Gibraltar
Greenland
Guadeloupe
Jan Mayen
Martinique
Montserrat
Netherlands Antilles
Reunion
Saint Denis
Saint Pierre & Miquelon
Svalbard
Turks & Caicos

(A few years ago Commerce considered each of these "countries" independent for export control purposes. Bermuda, French Guiana, Greenland, Miquelon & St. Pierre, and Netherlands Antilles are now listed separately in 748.9(a).)

~~South Africa~~ South Africa

740.1(a):

. . . General Prohibition One, Two, ~~or~~ Three , Five, Six, or Eight~~, as indicated under one or more otch Export Control Classification Numbers (ECCNs) in the Commerce Control List (CCL) in Supplement No. 1 to part 774 or the EAR. . . .~~ License Exceptions for items listed on the CCL as controlled for Short Supply reasons are found in part 754 of the EAR and in 740.9(b)(3,4) (return of unwanted shipments and return of shipments refused entry) and 740.11(b) (2)(ii), items for official use by personnel and agencies of the U.S. Government .. If your . . . ~~Eight.~~

740.1(e):

. . . Destination Control Statement requirements of 758.5 and 758.6 and 752.15(b) of the EAR.

740.2(a):

~~(1) Your authorization to use a License Exception has been suspended or revoked or your intended export does not qualify for a License Exception.~~

~~(2) The export or reexport is subject to one of the ten General Prohibitions, is not eligible for a License Exception and has not been authorized by BXA~~

(Suspension or revocation of authorization to use a License Exception would mean that General Prohibition Four applied and no License Exceptions overcome GP 4 per 740.1(a). A statement that you may not use a License Exception if the export is not eligible for one is circular and redundant.)

740.2(a)(4) . . . equipment , software or technology . . .

(742.7 lists software and technology as well as equipment items)

740.2(a)(5) . . . except that the items described in ECCNs 4A001.a.1, 4A001.a.2.a, 4A101, . . . 7A003, 7A004, 7A005, 7A006, . . . 7A104, 7A105, 7A106, 7A115, 7A116, ~~7B001~~

(For consistency with MTCR 9 Note 1, MTCR 10 Note, MTCR 11 Note 1, and MTCR 13 Note; although several of the the underlined ECCNs are marked in the CCL as controlled by DOS, their listing here would be consistent with the listing of those ECCNs in the CCL)

~~740.2(a)(6) . . .~~

(Duplicates 740.2(a)(4))

740.2(b):

All License Exceptions are subject to revision, suspension, or revocation, in whole or in part, without ~~advance~~ notice. . . .

(Some notice is necessary to make the revision, suspension, or revocation effective)

740.2 ~~(c) BXA may by informing the exporter, suspend or revoke any License Exception in order to comply with U.S. Wassenaar obligations. In addition, BXA may inform an exporter that before using any License Exception, a notice be submitted with BXA concerning the proposed export~~

(For consistency with part 743)

740.3(b):

Eligible Destinations. This License Exception is available for all destinations ~~in Country Group B (see Supplement No. 1 to part 740)~~ with no "x" in NS Column 3 (see Supplement No. 1 to part 738), provided that the net value of the commodities included in the same order and controlled under the same ECCN entry on the CCL does not exceed the amount specified in the LVS paragraph for that entry or, for shipments from the U.S. Virgin Islands to the British Virgin Islands of items for which the amount specified in the LVS paragraph is less than $500, the net value does not exceed $500.

(Virgin Islands revision for consistency with 771A.5(a)(2)(ii))

740.4, 740.5, 740.6 (GBS, CIV, and TSR) - delete

(Would be covered by Country Chart NLR)

If 740.5 and 740.6 retained:

. . . national security (NS) reasons ~~only~~ and not for missile technology (MT), nuclear proliferation (NP), chemical or biological (CB), or crime control (CC)

(Nothing is controlled for NS only; all NS items are also controlled for AT and for total embargoes)

Re Iran, Iraq, and Sudan as ineligible destinations —

(Because of Treasury jurisdiction, there is little, if any, need to list Iraq, Iran, and Sudan as ineligible destinations for License Exceptions. This is reflected in the omission of these countries from ineligible destinations in TSR assurances (740.6(a)(1)(i-iii)), TMP (740.9(a)(3), (a)(3)(i)(C), (b)(1)(ii), (b)(2)(ii)(B), (b)(3), foreign vessels or aircraft

(740.15(b)(1,2) and 744.7(b)(1,2)), SPR (754.2(h)), SS-SAMPLE (754.2(i)), and WRC (754.4(c)). However, the inclusion of Iran, Iraq, and Sudan as ineligible destinations for CTP (740.7(e)(5)(i)), RPL (740.10(a)(3)(iv), (b)(2)(iv), and (b)(3)(i)(D)), and AVS aircraft on temporary sojourn (740.15(a)(1)(i), (a)(2)(ii), and (a)(3)(v-ix)) implies that, where they are not listed as ineligible, they are eligible. The line-in line-out suggested revisions do not remedy this anomaly, because this is only part of the larger issue of the treatment of Iran, Iraq, and Sudan in other parts of the EAR as well (e.g., their omission from Country Group E:2). In addition, note the inconsistency of specifying Iran but not Iraq or Sudan as controlled destinations in ECCNs 1C991, 1C995, 2A994, 2D994 and 2E994 while omitting all three from 0A986, 0A988, 0A989, and 1C998.)

Re Syria as ineligible destination —

(The same License Exceptions which show Iran, Iraq, and Sudan as ineligible also show Syria as ineligible, whereas none of the others do. Since Treasury does not administer any controls to Syria, the lack of stated ineligibility for Syria for various License Exceptions means that Syria is literally, unambiguously, eligible. However, this may not be intended. The line-in line-out suggested revisions do not address this subject, since intentions are unknown.)

Re Cuba, Libya, and North Korea as ineligible destinations

(Note the inconsistency of specifying Cuba, Libya,and North Korea as controlled destinations in ECCNs 1C991, 1C995, 2A994, 2D994 and 2E994 while omitting all three from 0A986, 0A988, 0A989, and 1C998.)

740.7:

(a) Scope. License Exception CTP authorizes exports and reexports of ~~computers~~ "digital computers", "electronic assemblies" and related equipment therefor and specially designed components therefor controlled by ECCNs 4A002.a or 4A003, ... (Related equipment controlled under 4A003.d,

~~.f, and .g~~ is authorized under this License ~~Exception~~ Exception, only when exported or reexported with these computers as part of a system.) . . . use the CTP parameter to the exclusion of other technical parameters for computers or "electronic assemblies" classified under ECCN 4A003.a, .b ~~and .e~~ or .c, except for parameters specified as Missile Technology (MT) concerns ~~or 4A003.e (equipment performing analog to digital conversions exceeding the limits in ECCN 3A001.a.5.a).~~ This License Exception does not authorize the export or reexport of ~~graphic accelerators or coprocessors or~~ computers controlled for MT reasons.

(Any reference to 4A003.e, .f, or .g, including the exception for A-D converters, is an empty box, because f. no longer exists and e. and g. are eligible for GBS and CIV without limit and the only destinations not eligible for GBS or CIV are also not eligible for CTP.)

740.7 clarification option — merge (a) and (e), as follows:

(a) . . . The scope of License Exception CTP is limited, as follows:

(1) Cuba, Iran, Iraq, Libya, North Korea, Sudan, or Syria are ineligible for License Exception CTP;

(2) Computers ~~eligible for Licence Exception CTP~~ with a CTP exceeding 6,500 MTOPS may not be accessed either physically or computationally by nationals of Cuba, Iran, Iraq, Libya, North Korea, Sudan, or Syria, except that commercial consignees described in 742.12 of the EAR are prohibited only from giving such nationals user-accessible programmability;

(3) Limits in 740.7(c) and (d) for other countries may not be exceeded; and

(4) You may not use this License Exception to export or reexport items that you know will be used to enhance the CTP beyond the eligibility limit allowed to your country of destination.

(5) This License Exception does not authorize the export or reexport of ~~graphic accelerators or coprocessors, or~~ computers controlled for MT reasons.

(6) ~~Computers, software and specially designed technology~~ Items eligible for License Exception CTP may not be reexported/retransferred without prior authorization from BXA, i.e., a license, a permissive reexport, ~~another~~ a License Exception, or "No License Required". . . .
(The "not authorize . . . graphic accelerators or coprocessors" statement is inconsistent with the "4A003.d . . . is authorized under this License Exception" statement. Eligibility of a reexport under License Exception CTP would constitute "prior authorization" from BXA.)

740.7 (b) Computer Tier 1.

(1) . . . Belgium, Canada, . . . ~~the Holy See,~~ . . . ~~Liechtenstein,~~ . . . ~~San Marino,~~ . . .;
(2) ~~Eligible Computers. The computers eligible for License Exception CTP are those with CTP greater than 6,500 MTOPS~~ Limits. None other than 740.7(a)(2) and (a)(5)

740.7 (c) Computer Tier 2.

(1) . . . Central African Republic, . . . Slovakia ~~Republic~~ . . .
(2) ~~Eligible Computers~~ Limits. ~~The computers eligible for License Exception CTP are those having a~~
(i) Re 4A002.a, 4A003.b, and 4A003.c, Composite Theoretical Performance (CTP) ~~greater then 6,500 but equal to or less than~~ not exceeding 33,000 Millions of Theoretical Operations Per Second (MTOPS);
(ii) Restrictions in 740.7(a).

(d) Computer Tier 3.

. . .

(2) ~~Eligible computers~~ Limits. ~~The computers eligible for licence Exception CTP are those having a~~
(i) Re 4A002.a, 4A003.b, and 4A003.c, Composite Theoretical Performance (CTP) ~~greater than 6,500 but equal to or less than~~ not exceeding 20,000 Millions of Theoretical Operations Per Second (MTOPS) subject to the limitations in 740.7(d)(4) and 742.12 (b)(3)(i)(C) and (b)(3)(iv);
(ii) Restrictions in 740.7(a)

. . .

740.9(a)(1):

. . . Commodities ~~and software~~ shipped under this License Exception must be returned . . . This requirement does not apply if the commodities ~~and software~~ are . . .

(For consistency with 771A.22(c)(1)(ii))

740.9(a)(2)(v):

Containers ~~for which another License Exception is not available and~~ that are necessary for export of commodities. However, this License Exception does not authorize the export of the container's contents, which, if not exempt from licensing by another License Exception or a No License Required (NLR) provision must be separately authorized for export under ~~either a License Exception or~~ a license.

(If another License Exception for containers were available, there would be no need to refer to TMP)

740.9(a)(3)(i):

(A) No commodity or software may be exported to ~~Country Group E:2 (see Supplement No. 1 to part 740)~~ Cuba, North Korea, or Libya, except . . .

(B) No commodity or software controlled for NS, MT, MP, or CB reasons except for those requiring a license only to CB Column 3 or NP Column 2 may be exported to ~~Country Group D:1 (see Supplement No. 1 to part 740~~ countries with a CIV footnote following the "x" in NS Column 3 (see Supplement No. 1 to part 738) except: . . .

(For consistency with 771A.22(c)(1)(ii))

(C) . . . by ~~any country in Country Group D:1 or E:2, or any national thereof. (see Supplement No. 1 to part 740.)~~ Cuba, North Korea, Libya, or any country with a CIV footnote following the "x" in NS Column 3 (see Supplement No. 1 to part 738).

740.9(a)(3)(ii):

. . . ~~outside of Country Group A:4 (Nuclear Supplier's Group) (see Supplement No. 1 to part 740.)~~ in a country marked "x" in NP Column 1 (see Supplement No. 1 to part 738) . . .

740.9(b)(1)(i):

Items controlled for national security, nuclear proliferation, missile technology, or chemical and biological weapons reasons may not be exported to ~~Country Group D:1, 2, 3, or 4 (see Supplement No. 1 to part 740)~~ countries with a CIV footnote following the "x' in NS Column 3, an "x" in MT Column 2, an "x" in NP Column 2, or an "x" in CB Column 3 (see Supplement No. 1 to part 738), respectively, under this paragraph (b)(1).

740.9(b)(1)(ii):

Items controlled to a country marked with a CIV footnote following the "x" in NS Column 3 or an "x" in MT Column 2, NP Column 2, or CB Column 3 may not be exported to ~~Country Group E:2~~ Cuba, North Korea, or Libya under this License Exception

740.9(b)(1)(iv):

. . . ~~commodities or software~~ commodities, software, or technology . . . ~~commodity or software~~ commodity, software, or technology . . .

740.9(b)(2)(ii):

Items may be exported to any destination other than the country from which imported except: . . .

(B) Exports to ~~Country Group E:2 (see Supplement No. 1 to part 740)~~ Cuba, North Korea, or Libya; or

(C) Exports to ~~Country Group D:1, 2, 3, or 4 (see Supplement No. 1 to part 740) of items controlled for national security, missile technology, chemical and biological weapons reasons, or nuclear proliferation, respectively~~ countries with a CIV footnote following the "x" in NS Column 3, an "x" in MT Column 2, an "x" in NP Column 2, or an "x" in CB Column 3 (see Supplement No. 1 to part 738) of items controlled for national security, missile technology, nuclear proliferation, or chemical or biological weapons, respectively.

740.9(c):

. . . all countries except ~~those Country Groups E:2~~ Cuba North Korea, and Libya.

740.10(a)(3)(iii):

. . . to any ~~destination except Iceland, New Zealand, or the countries listed in Country Group A:1 (see Supplement No. 1 to part 740)~~ country marked "x" in CC Column 1 (see Supplement No. 1 to part 738)

740.10(a)(4):

. . . in ~~Country Group B (see Supplement No. 1 to part 740)~~ a country not marked "x" in NS Column 3 (see Supplement No. 1 to part 738) . . .

740.10(b)(2)(iii):

. . . ~~Country Group D:1~~ countries with a CIV footnote following the "x" in NS Column 3 (except the People's Republic of China) (see Supplement No. 1 to part ~~740~~ 738)

740.10(b)(3)(ii):

Special conditions applicable to exports to ~~Country Group B and Country Group D:1~~ countries identified in NS Column 3. (See Supplement No. 1 to part ~~740~~ 738) . . . to a ~~destination in Country Group B or Country Group D:1~~ country with no "x" in NS Column 3 or with a CIV footnote following the "x" in NS Column 3:

. . .

(B) . . . in ~~Country Group D:1~~ a country with a CIV footnote following the "x" in NS Column 3 (except the PRC)

(C) . . . in ~~Country Group B~~ a country with no "x" in NS Column 3 . . .

740.11(b)(2)(iii)(A):

Items for official use within national territory by agencies of ~~the U.S. Government~~ a cooperating government . . .

740.11(b)(2)(iv):

. . . in ~~Country Group B~~ a country with no "x" in NS Column 3 (see Supplement No. 1 to part ~~740~~ 738)

740.11(b)(3)(ii):

. . . national governments of countries ~~listed in Country Group A:1~~ without an "x" in CC Column 1 (less Iceland and New

Zealand) (see Supplement No. 1 to part ~~740~~ 738) and the national governments of Argentina, Austria, Finland, Ireland, Korea (Republic of), Singapore, Sweden, and Switzerland.

740.11 Supplement 1 (a):

Items for official use within national territory by agencies of ~~the U.S. Government~~ a cooperating government. . . .

740.11 Supplement 1 (b)(1)(vii):

(B) . . . ~~1C102~~ 1C012 . . .
(C) . . . ~~6A001.a.2.3~~ 6A001.a.2.e . . .
(D) . . . ~~6A001.a.2.3~~ 6A001.a.2.e . . .

740.12(a)(2)(i)(A):

The commodity must not be controlled for chemical and biological weapons (CB) (unless controlled only to CB Column 3), missile technology (MT), national security (NS), or nuclear proliferation (NP) (unless controlled only to NP Column 2) . . .

(For consistency with 771A.18(b)(1)(i))

740.12(a)(2):

(iii) Frequency. Except for gift parcels of food ~~to Cuba~~ . . .
(iv) . . . There is no dollar value limit on food contained in a gift parcel ~~to Cuba~~.

(Limiting food exceptions to Cuba is probably unintentional)

740.12(b)(5)(iii):

Exports to Cuba of medical items excluded by ~~746.2(a)(3)~~ 746.2(b)(1)(i-v) of the EAR.

740.13:

. . . encryption software controlled under ECCN 5D002 . . .

(For consistency with 740.13(d)(2))

740.13(a):

(1) Scope. This License Exception permits exports and reexports of "operation technology " and "operation software".

(i) "Operation technology" is . . .

~~(2) Provisions and Destinations.~~

~~(i) Provisions.~~

(ii) "Operation software" ~~may be reexported or reexported under this License Exception provided that both of the following conditions are met~~ is:

(A) ~~The operation software is~~ the minimum necessary to operate equipment authorized for export or reexport; and

(B) ~~The operation software is~~ in object code.

(2) ~~(ii)~~ Destinations. . . .

740.13(b):

. . . technology or software . . . (eight times)
(For consistency with the inclusion of software in the phrase "technical data" as used in 779A.4(b)(2))

740.13(e)(1):

. . . Encryption source code otherwise controlled under 5D002
(For consistency with "may be exported or reexported without review under License Exception TSU. . .")

740.14:

(a) Scope. This License Exception authorizes individuals ~~leaving the United States~~ . . .

(b) Eligibility. Individuals ~~leaving the United States~~ . . .

(c) Limits on eligibility. ~~The export of any commodity or software is limited or prohibited, if the kind or quantity is in excess of the limits described in this section. In addition,~~ the cCommodities or software ~~must be~~ are ineligible for this License Exception unless they are:

(1) Owned by the individuals (or by members of their immediate families) or by crew members ~~of exporting carriers on the dates they depart from the United States~~;

(2) Intended for ~~and necessary~~ and appropriate for the use of the individuals or members of their immediate families, or by the crew members or members of their immediate families ~~of exporting carriers~~;

. . .

(d) . . .Personal baggage controlled for chemical and biological weapons (CB) (unless controlled only to CB Column 3), missile technology (MT), national security (NS) or nuclear nonproliferation (NP (unless controlled only to NP Column 2)

must be shipped within 3 months . . . However, commodities controlled for ~~CB, MT, NS or NP~~ NS, MT, NP, or CB may not be exported under this License Exception to ~~Country Group D or Country Group E:2 (See Supplement No. 1 to part 740.)~~ countries with a CIV footnote following the "x" in NS Column 3, an "x" in MT Column 2, an "x" in NP Column 2, or an "x" in CB Column 3 (see Supplement No. 1 to part 738), respectively, nor to Cuba, North Korea, or Libya.

(It is illogical to limit License Exception BAG to persons leaving the United States or to items owned on the date of departure from the United States. There should be less concern with respect to a traveler returning to the United States with a U.S.-origin item purchased abroad than a traveler departing from the United States with that same item. Eligibility for items appropriate for the use of a crew member's family is for consistency with 771A.11(b)(2).

Excepting CB Column 3 and NP Column 2 from the restrictions in 740.14(d) is for consistency with 771A.6(a).)

740.15(a)(2)(i) add:

(E) The aircraft is not being used to supply or transport to Rwanda or Serbia & Montenegro items listed in 746.8(b)(i) or (b)((ii) or 746.9(a).

740.15(a)(2)(ii) add:

(F) The aircraft is not being used to supply or transport to Rwanda or Serbia & Montenegro items listed in 746.8(b)(i) or (b)((ii).or 746.9(a)

740.15(b)(3):

Ship and plane stores. Usual and reasonable kinds and quantities of the following commodities may be exported or reexported for use or consumption on board an aircraft or vessel of any registry during the outgoing and immediate return flight or voyage. (Note that fuel and related commodities ~~that qualify as ship or plane stores as described in~~ controlled by ECCNs 1C980, 1C981, 1C982, 1C983, or 1C984 are not eligible for this License Exception ~~must be exported under the short supply License Exception SPR (see 754.2(h) of the EAR.~~)

. . .

(v) Saloon stores or supplies;
(vi) Fuel.

740.15(c)(1):

~~Exports~~ Shipments to vessels or planes of U.S. or Canadian registry. Export or reexport may be made . . . except a port in ~~Cuba,~~ North Korea . . .

740.15(c)(2):

~~Exports~~ Shipments to U.S. or Canadian airline's installation or agent. Exports or reexports . . . in any foreign destination except ~~Cuba,~~ North Korea . . .

(ii) . . .except where such aircraft is located in, or owned, operated or controlled by, or leased or chartered to, ~~Cuba,~~ North Korea . . .

740.15(c)(3)

Applicable commodities. . . .

Note to paragraph (c)(3) of this section: Fuel and related commodities ~~for shipment to vessels or planes of U.S. or Canadian registry as described in~~ controlled by ECCNs 1C980, 1C981, 1C982, 1C983, or 1C984 are not eligible for this License Exception ~~must be shipped under the short supply~~ License Exception SPR (see 754.2(h) of the EAR);.

. . .

(v) Saloon stores or supplies; ~~and~~

(vi) Fuel; and

~~(vi)~~ (vii) Equipment and spare parts.

(License Exception SPR applies only to crude oil, not to fuel for aircraft. License Exception AVS would apply to fuel which is covered only by EAR99 if the 771A applicability of PLANE STORES, SHIP STORES, and RCS to fuel to Cuba, North Korea, and Libya is to continue. There is no need to repeat the current equivalent of RCS in two places (740.15(c) and 744.7(b)), since "unless a License Exception . . . permits" in 744.7(a) excepts from 744.7(a) the applicable portions of AVS. Removal of Cuba ineligibility for this portion of AVS is for consistency with 771A.12 and 744.7(b).)

740.16(a) Delete, because United States no longer has the opportunity to object to COCOM cases. If (a) is nevertheless retained:

> Reexports from ~~Country Group A:1 and cooperating countries~~ countries without an "x" in NS Column 2 Reexports may be made from ~~Country Group A:1 or from cooperating~~ countries without an "x" in NS Column 2, provided that:
>
> . . .
>
> (3) The reexport is destined to either:
>
> (i) A country ~~in Country Group B that is not also included in Country Group D:2, D:3, or D:4; Cambodia; or Laos;~~ without an "x" in NS Column 3, MT Column 2, NP Column 2, or CB Column 3, excluding Cambodia and Laos, and the commodity being reexported is both controlled for national security reasons and not controlled for export to ~~Country Group A:1~~ a country without an "x" in NS Column 2; or
>
> (ii) A country ~~in Country Group D:1 only (National Security)~~ marked "x" in NS Column 3 (see Supplement No. 1 to part ~~740~~ 738), other than Cambodia and Laos . . .

740.16(b):

> Reexports to and among ~~Country Group A:1 and cooperating countries~~ countries without an "x" in NS Column 2. Reexports may be made to and among ~~Country Group A:1 and cooperating~~ countries without an "x" in NS Column 2 (see Supplement No. 1 to part 738), provided that eligible commodities are for use or consumption within ~~a Country Group A:1 (see Supplement No. 1 to part 740) or cooperating~~ such country, or for reexport from such country in accordance with other provisions of the EAR. All commodities except the following are eligible for reexport to and among ~~Country Group A:1 and cooperating~~ such countries:
>
> (1) . . . ~~10,000 MTOPS~~ 33,000 MTOPS . . .

740.16(d):

> Reexports of any item ~~from Canada~~ that, at the time of reexport, may be exported directly from the United States to the new country of destination under any License Exception or no license required provision.

740.16(g) delete

(Unnecessary if, as recommended, Liechtenstein is deleted from the Country Chart because Switzerland administers its export controls)

740.16(h):

Shipments of ~~foreign-made products that incorporate~~ U.S.-origin components incorporated in foreign-made products . . .

740.16(i):

Reexport to ~~Iran and~~ Sudan . . .

(For consistency with 742.8(a)(2))

740 Supplement 1 delete

(Country Chart can serve the same purpose)

740 Supplement 1 Country Group B (if Supplement 1 retained):

delete San Marino, Vatican City, and United States;
change Antigua to Antigua & Barbuda;
change Saint Vincent to Saint Vincent & Grenadines;
add: Anguilla
Bermuda
British Indian Ocean Territories
British Virgin Islands
Caymans
Faeroe Islands
French Guiana
Gibraltar
Greenland
Guadeloupe
Jan Mayen
Macao
Martinique
Montserrat
Netherlands Antilles
Reunion
Saint Denis
Saint Pierre & Miquelon
Svalbard
Turks & Caicos
Change Montengro to Montenegro and Kosovo

740 Supplement 1 Country Group D (if Supplement 1 retained):

~~Yeman~~ Yemen

742.2(b)(3)(i):

Require a license pursuant to the Country Chart to the destination in the license application for reasons other than short supply

(Probable intent. Otherwise this is open-ended, since all items require a license to some destination.)

742.3(a):

. . .

(1) . . . to all destinations except Nuclear Suppliers Group (NSG) member countries ~~(Country Group A:4)~~ countries marked "x" in NP Column 1 (see Supplement No. 1 to part ~~740~~ 738 of the EAR).

(2) . . . to ~~Country Group D:2~~ countries marked "x" in NP Column 2 (see Supplement No. 1 to part ~~740~~ 738 of the EAR).

742.3(b)(1)(v):

Whether any party to the transaction has been engaged in ~~clandestine or illegal~~ procurement activities in violation of license requirements;

(Clandestine procurement is not per se a violation)

742.3(b)(2)(i):

Require a license ~~on the CCL~~ pursuant to the Country Chart to the destination in the license application for reasons other than ~~"~~short supply; ~~"~~ and

742.4(a):

. . . Accordingly, a license is required unless a License Exception applies . . . NS Column 1 . . . A license is required, unless a License Exception applies, to all destinations except ~~Country Group A:1 and~~ cooperating countries , i.e., those marked "x" in NS Column 2 (see Supplement No. 1 to part ~~740~~ 738) , for all items in ECCNs on the CCL that include NS Column 2 in the Country Chart Column of the "License Requirements" section. The purpose of the controls is to

ensure that these items do not make a contribution to the military potential of countries ~~in Country Group D:1~~ with a CIV footnote following the "x" in NS Column 3 (see Supplement No. 1 to part ~~740~~ 738 of the EAR) that would prove detrimental to the national security of the United States. ~~License Exception GBS is available~~ Licenses are required for the export ~~and~~ or reexport to fewer countries of certain national security controlled items ~~to Country Group B~~ marked NS Column 3 (see ~~740.3(b)~~ the Commodity Control List and Supplement No. 1 to part ~~740~~ 738 of the EAR).

742.4(b):

(1) The policy for national security controlled items exported or reexported to any country except a country ~~in Country Group D:1~~ with a CIV footnote following the "x" in NS Column 3 or Country Group E:2 (see Supplement No. 1 to part ~~740~~ 738 of the EAR) is to approve applications unless there is a significant risk that the items will be diverted to a country ~~in Country Group D:1~~ with a CIV footnote following the "x" in NS Column 3 unless a different licensing policy applies for items also controlled for other reasons or for direct exports to such country pursuant to paragraphs (2) through (7) of this section.

(2) . . .the general policy for exports and reexports of items to ~~Country Group D:1~~ countries with a CIV footnote following the "x" in NS Column 3 (see Supplement No. 1 to part ~~740~~ 738 of the EAR) . . .

742.5(a)(2):

~~The term "missles" is defined as rocket systems (including ballistic missle systems, space launch vehicles, and sounding rockets) and unmanned air vehicle systems (including cruise missile systems, target drones, and recon naissance drones) capable of delivering at least 500 kilograms (kg) payload to a range of at least 300 kilometers.~~ Reserved.

(This term is defined in part 772)

742.5(b)(2)(iii):

The capabilities and objectives of the missile and space programs of the recipient country with particular attention to

the countries and missile projects listed in MT Column 2 and footnote 1.

742.5(b)(3)(i):

Require a ~~validated~~ license pursuant to the Country Chart to the destination in the license application for reasons other than short supply; and

742.5(d):

Missile Technology Control Regime. Missile Technology Control Regime (MTCR) members are ~~listed in Country Group A:2 (see Supplement No. 1 o part 740 of the EAR)~~ Argentina, Australia, Austria, Belgium, Brazil, Canada, Denmark, Finland, France, Germany Greece, Hungary, Iceland Ireland, Italy, Japan, Luxembourg, Netherlands, New Zealand, Norway, Portugal Russia, South Africa, Spain, Sweden, Switzerland, United Kingdom, and United States. Controls on items identified in paragraph (a) of this section are, for the most part, consistent with the list agreed to in the MTCR and included in the MTCR Annex.

742.6(a)(2):

As indicated in the CCL and in RS Column 2 of the Country Chart (see Supplement No. 1 to part 738 of the EAR), a license is required to any destination except ~~countries in Country Group A:1 (see Supplement No. 1 to part 740 of the EAR), Iceland and New Zealand~~ those not marked with an "x" in RS Column 2 for . . . ~~0A018.e~~

(RS is not mentioned in ECCN 0A018)

742.7(a):

. . .

(2) Shotguns with a barrel length greater than or equal to 24 inches identified in ECCN 0A984 on the CCL under CC Column No. 2 in the Country Chart column of the "License Requirements" section ~~regardless of end-user~~ if for sale or resale to other than police or law enforcement entities to countries listed in CC Column 2 (Supplement No. 1 to part 738 of the EAR).

~~(3) Shotguns with a barrel length over 24 inches identified in ECCN 0A984 on the CCL under CC Column No. 3 in the Country Chart column of the "License Requirements" only if for sale or resale to police or law enforcement entities to countries listed in CC Column 3 (Supplement No. 1 to part 738 of the EAR).~~

742.8, 742.9, and 742.10 (consider moving to a new 746.6)

742.15(b)(1):

. . . ~~may~~ will, after classification by BXA as ECCNs 5A992, 5D992 or 5E992, be released from "EI" or "NS" controls . . . The following encryption items ~~may be~~ are eligible for such treatment:

(i) ~~56 bit encryption commodities, software and technology~~ "Symmetric algorithm". Encryption commodities, software and technology employing a key length up to and including 56-bits ~~with an asymmetric key exchange algorithm not exceeding 512 bits may be classified under ECCNs 5A992, 5D992 or 5E992~~

(ii) ~~Key management products~~ "Asymmetric algorithm". ~~Products which only provide key management with asymmetric key exchange algorithms not exceeding 512 bits may be eligible for classification under ECCNs 5A992 or 5D992.~~ Where the security of the algorithm is based on any of the following:

(A) Factorization of integers in excess of 512 bits (e.g., RSA);

(B) Computation of discrete logarithms in a multiplicative group of a finite field of size greater than 512 bits (e.g., Diffie-Hellman over Z/pZ); or

(C) Discrete logarithms in a group other than mentioned in (B) in excess of 112 bits (e.g., Diffie-Hellman over an elliptic curve).

(For consistency with ECCN 5A002.a.1)

742 Supplement No. 2 move to become a 746 Supplement

742 Supplement No. 2 (c)(6):

All "aircraft" (powered and unpowered), ~~helicopters,~~ . . .
(Definition of "aircraft" includes helicopters)

743.1(b) . . . License Exceptions GBS, CIV, TSR, LVS, CTP, and the cooperating government portions of GOV (740.11(b)(2)(iii)(B) and (b)(2)(iv)(B) call for such reporting; but 740.11(a) and (b)(2)(i), (b)(2)(ii), and (c) do not)

743.1(c)(1)(i) Category 1: 1A002, 1C001, 1C007.c and .d, 1C010.c and .d, 1C010.c and .d, 1D002 for materials listed in this paragraph 743.1(c)(1)(i), 1E001 for equipment or materials listed in this paragraph 743.1(c)(1)(i), 1E002.e and 1E002.f

743.1(c)(1)(ii) Category 2: 2B001.a having a positioning accuracy better than 3.6 micrometer, ~~or .b (certain items only; see Note 1 to this paragraph)~~, 2B001.b.1 having a positioning accuracy better than 3.6 micrometer, 2B001.b.2, 2B001.b.3, 2B001.d, 2B001.f, 2B003, 2D001 for equipment listed in this paragraph 743.1(c)(1)(ii), 2E001 for equipment listed in this paragraph 743.1(c)(1)(ii), and 2E002 for equipment listed in this paragraph 743.1(c)(1)(ii);
~~Note to paragraph (c)(1)(ii) The following are not controlled for NP reasons . . .~~

743.1(c)(1)(iii) Category 3: 3A002.g.2, 3B001.a.2, 3D001 for 3A002.g.2 or 3B001.a.2 and 3E001 for 3A002.g.2 or 3B001.a.2..

743.1(c)(1)(iv) Category 4: 4A001.a.2 ~~and .b~~, 4A003.b and .c (see ~~paragraph (c)(2) of this section~~ Note 1 to this paragraph), 4D001 (certain items only; see Note 2 to this paragraph), ~~4D003.c,~~ and 4E001 (certain items only; see Note 3 to this paragraph).
Note 1.B (Text of existing Note to paragraph (c)(2))
Note 2. The reporting requirement is limited to the following portion of 4D001: "Software" specially designed for the "development" or "production" of 4A001.a.2, 4A003.b, 4A003.c, or the portion of 4D001 described in this Note.
Note 3. The reporting requirement is limited to the following portion of 4E001: "Technology" according to the General Technology Note for the "development" or "production" of 4A001.a.2, 4A003.b, 4A003.c, or the portion of 4D001 described in Note 2.

743.1(c)(1)(v) Category 5: ~~5A001.b.8~~ 5A001.b.3 and b.4, 5B001 .a (items specially designed for ~~5A001.b.8~~ 5A001.b.3 or b.4), 5D001.a

(certain items only, see Note 1) ~~and .b~~ 5D001.b (certain items only, see Note 2), 5E001.a (certain items only, see Note 3).

Note 1. The reporting requirement is limited to the following portion of 5D001.a: "Software" specially designed for the "development" or "production" of 5A001.b3 or b.4 or the portion of 5B001.a specially designed for 5A001.b.3 or 4.

Note 2. The reporting requirement is limited to the following portion of 5D001.b: "Software" specially designed or modified to support "technology" described in Note 3.

Note 3. The reporting requirement is limited to the following portion of 5E001:a: "Technology" according to the General Technology Note for the "development" or "production" of 5A001.b.3 or b.4, the portion of 5B001.a specially designed for 5A001.b.3 or b.4, or the portions of 5D001.a or .b described in Notes 1 or 2.

743.1(c)(1)(vi) Category 6: ~~6A001.a.1.b~~ 6A001.a.1.b.1 below 5kHz, 6A001.a.1.b.2 from 5kHz to 24 kHz, 6A001.a.1.b.3-6, 6A001.a.2.a.1, 6A001.a.2.a.2, 6A001.a.2.a.5, 6A001.a.2.b, 6A001.a.2.c real time application, 6A001.a.2.d, ~~and~~ 6A001.a.2.e, 6A001.a.2.f real time application, 6A002.a.1, 6A002.a.2.a.1, 6A002.a.2.a.2, 6A002.a.2.a.3.a exceeding 550 microA/lm, 6A002.a.2.a.3.b, 6A002.a.2.a.3.c, 6A002.a.3 (certain items only; see Note 1), 6A002.b, 6A002.c incorporating image intensifier tubes listed in 6A002.a.2.a in this paragraph 743.1(c)(1)(vi) or "focal plane arrays" listed 6A002.a.3 in this paragraph 743.1(c)(1)(vi), 6A002.e, 6A003.b.3 incorporating image intensifier tubes listed in 6A002.a.2.a in this paragraph 743.1(c)(1)(vi), 6A003.b.4 incorporating "focal plane arrays" listed in 6A002.a.3 in this paragraph 743.1(c)(1)(vi), 6A004.c and .d, 6A006.g excluding compensators which provide only absolute values of the earth's magnetic field as output (i.e., the frequency bandwidth of the output extends from DC to at least 0.8 Hz), ~~and h~~ 6A006.h, 6A008.d, .h, ~~and~~ .k,, and .l.3, 6B008, 6D001 for equipment in 6A004, 6A008, or 6B008 listed in this paragraph 743.1(c)(1)(vi), 6D003.a, 6E001 for equipment listed in this paragraph 743.1(c)(1)(vi), and 6E002 for equipment listed in this paragraph 743.1(c)(1)(vi).

Note 1. The reporting requirement for 6A002.a.3 excludes the following "focal plane arrays":

a. Platinum Silicide having less than 10,000 elements;

b. Iridium Silicide;

c. Indium Antimonide or Lead Selenide having less than 256 elements;
d. Indium Arsenide;
e. Lead Sulphide;
f. Indium Gallium Arsenide;
g. Mercury Cadmium Telluride, as follows:
13. 'Scanning Arrays' having any of the following:
a. 30 elements or less; or
b. Incorporating time delay-and-integration within the element and having 2 elements or less;
14. 'Staring Arrays' less than 256 elements;
Technical Notes:
'Scanning Arrays' are defined as "focal plane arrays" designed for use with a scanning optical system that images a scene in a sequential manner to produce an image.
'Staring Arrays' are defined as "focal plane arrays" designed for use with a non-scanning optical system that images a scene.
h. Gallium Arsenide or Gallium Aluminum Arsenide quantum well having less than 256 elements;
i. Pyroelectric or Ferroelectric (including barium-strontium titanate, lead zirconate titanate or lead scandium titanate) having less than 8,000 elements;
j. Vanadium Oxide-Silicon nitride microbolometer having less than 8,000 elements.

743.1(c)(1)(vii) Category 7: 7D002, 7D003.a, .b, .c, and d.1 to .4 & .7, 7E001, and 7E002

743.1(c)(1)(viii) Category 8: 8A001 .b, .c, .d, 8A002.b for submersible vehicles controlled by 8A001.b, c, or d, 8A002.h, .j, ~~.0.3.a~~, .0.3, and .p, 8D001 for commodities listed in this paragraph 743.1(c)(1)(viii), 8D002, 8E001 for commodities listed in this paragraph 743.1(c)(1)(viii), and 8E002.a; and

743.1(c)(1) ~~(viii)~~ **(ix)** Category 9: 9B001.b, 9D001 for 9B001.b and the portions of 9E001, 9E002, and 9E003 described in this paragraph, 9D002 for 9B001.b, 9D004.a and .c, 9E001 for 9B001.b and the

portions of 9D001 and 9D002 for 9B001.b, 9E002 for 9B001,b, 9E003.a.1, .a.2, .a.3, .a.4, .a.5, .a.8, and .a.9

743.1(c)(2) delete

744.1(a):

. . . This part contains prohibitions against exports, reexports, ~~and~~ selected transfers to certain end-users and end-uses ~~as introduced under General Prohibition Four (Denial Orders) and prohibitions against exports or reexports to certain end uses as introduced~~, under General Prohibition Five (End-use/ End-user) and against specified activities under General Prohibition Seven (Support of Proliferation Activities). Sections 744.2, 744.3, 744.4, and 744.5, and 744.6(a)(1)(i) prohibit exports and reexports ~~of items subjuect to the EAR~~ to defined nuclear, missile, chemical and biological weapons, and nuclear maritime end-uses or end-users. Section 744.6 (a)(1)(ii), (a)(2), (a)(3) and (b) prohibit s certain activities by U.S. persons in support of certain nuclear, missile, chemical, or biological end-uses regardless of whether that support involves ~~the~~ an export or reexport ~~of items subject to the EAR~~. . . .

744.1(c):

. . . No License Exceptions are available for exports or reexport to listed entities of specified items except the portions of TSU described in 740.13(a,b,c), the portion of AVS described in 744.7(b) and 740.15(c), and the License Exceptions described in 744.11(b) and 744.12(b).

(TSU is for consistency with 732.3(h)(2))

744.2 title:

Restrictions on certain nuclear end-uses or end-users.

744.2(a):

General prohibition. In addition to the license requirements for items specified on the CCL as controlled for NP reasons, you may not export or reexport to any destination other than countries in the Supplement No. 3 to this part any item ~~subject to the EAR~~ without a license . . .

744.2(c):

. . . operation technology and software or sales technology and software or software update provisions of License Exception TSU (see 740.13(a) and (b) and (c)), ~~but only to and for use in countries listed in Country Group A:1 (see Supplement No. 1 to part 740 of the EAR), Iceland and New Zealand. Notwithstanding the provisions of part 740 of the EAR, the provisions of 740.13(a) and (b) will only overcome general prohibition five for countries listed in Country Group A: 1, Iceland and New Zealand~~.

(For consistency with 732.3(h)(2))

744.2(d):

. . .

(5) Whether the end-user has been engaged in ~~clandestine~~ or illegal procurement activities

(6) . . . or whether the ~~end use~~ end-user has previously diverted

. . .

(7) . . . described in 744.2(a) . . .

744.3 title:

Restrictions on certain missile end-uses or end-users.

744.3(a):

General prohibition. In addition to the license requirements for items specified on the CCL as controlled for MT reasons, you may not export or reexport ~~an~~ any item ~~subject to the EAR~~ to any destination, including Canada, without a license if at the time of export or reexport you know the item:

(1) Is destined to or for a project listed in the footnote to ~~Country Group D:4~~ countries in MT Column 2 (see Supplement No. 1 to part ~~740~~ 738 of the EAR); or

(2) Will be used in the design, development, production or use of missiles in or by a country ~~listed in Country Group D:4~~ marked with an "x" in MT Column 2, whether or not that use involves a listed project.

744.3(c) Exceptions. No License Exceptions apply to the prohibitions described in paragraph (a) and (b) of this section, except the portions of TSU described in 740.13(a,b,c).

744.4 title:

Restrictions on certain chemical and biological weapons end-uses or end-users.

744.4(a):

General prohibition. In addition to the license requirements for items specified on the CCL as controlled for CB reasons, you may not export or reexport ~~an~~ any item ~~subject to the EAR~~ to any destination, including Canada, without a license if at the time of export or reexport you know the item will be used . . . in a country ~~listed in Country Group D:3~~ marked "x" in CB Column 3 (see Supplement No. 1 to part ~~740~~ 738 of the EAR).

744.4(c) Exceptions. No License Exceptions apply to the prohibitions described in paragraph (a) and (b) of this section, except the portions of TSU described in 740.13(a,b,c).

744.5(a):

General prohibition. ~~In addition to the license requirements for items specified on the CCL, y~~You may not export or reexport ~~certain~~ any technology ~~subject to the EAR~~ specified below to any destination including Canada, without a license if at the time of the export or reexport you know the item is for use in connection with a foreign maritime nuclear propulsion project. This prohibition applies to any technology relating to maritime nuclear propulsion plants, their land prototypes, and special facilities for their construction, support, or maintenance, including any machinery, devices, components, or equipment specifically developed or designed for use in such plants or facilities.

744.5(b) Exceptions. The exceptions provided in part 740 of the EAR do not apply to the prohibitions described in paragraph (a) of this section, except the portions of TSU described in 740.13(a,b,c).

744.6(a)(1)(i): . . .any item where that person knows that such items:

(1)(i)(A) . . . a country ~~listed in Country Group D:2~~ marked "x" in NP Column 2 (see Supplement No. 1 to part ~~740~~ 738 of the EAR).;

(1)(i)(B) . . . a country ~~listed in Country Group D:4~~ marked "x" in MT Column 2 (see Supplement No. 1 to part ~~740~~ 738 of the EAR); or
(1)(i)(C) . . . a country ~~listed in Country Group D:3~~ marked "x" in CB Column 3 (see Supplement No. 1 to part ~~740~~ 738 of the EAR).
. . .
(2)(i) . . . a country ~~listed in Country Group D:4~~ marked "x" in MT Column 2 (see Supplement No. 1 to part ~~740~~ 738 of the EAR); or
(2)(ii) . . . a country ~~listed in Country Group D:3~~ marked "x" in CB Column 3 (see Supplement No. 1 to part ~~740~~ 738 of the EAR).
(3) . . . in countries other than those ~~listed in Country Group A:3 (~~ in the Australia Group~~)~~, i.e., those marked "x" in CB Column 2 (see Supplement No. 1 to part ~~740~~ 738 of the EAR).

744.6(d) Exceptions. No License Exceptions apply to the prohibitions described in paragraph (a) and (b) of this section, except, with respect to subparagraph (a)(1)(i), the portions of TSU described in 740.13(a,b,c).

744.7(b): delete
(740.15(c) is substantially the same as 744.7(b) and this portion of AVS applies to 744.7 by virtue of "unless a License Exception or NLR permits the shipment to be made" in 744.7(a))

744.7(b) (if 744.7(b) retained):
(1) . . . or ~~plane~~ aircraft . . . or ~~Country Group D:1~~ country with a CIV footnote following the "x" in NS Column 3 (excluding the PRC and Romania) (see Supplement No. 1 to part ~~740~~ 738) . . .
(i) . . . ~~plane~~ aircraft . . .
(ii) . . . ~~plane~~ aircraft . . .
(2) . . . or ~~Country Group D:1~~ country with a CIV footnote following the "x" in NS Column 3 (excluding the PRC and Romania) (see Supplement No. 1 to part ~~740~~ 738) . . .

(ii) . . . or ~~Country Group D:1~~ country with a CIV footnote following the "x" in NS Column 3 (excluding the PRC) (see Supplement No. 1 to part ~~740~~ 738) . . .

744.10(b)

Exceptions. No License Exceptions apply to the prohibitions described in paragraph (a) of this section, except the portions of TSU described in 740.13(a,b,c).

744.11(b) . . . and the portions of TSU described in 740.13(a,b,c)

744.12(b) . . . and the portions of TSU described in 740.13(a,b,c)

744.13(b) . . . , except the portions of TSU described in 740.13(a,b,c).

744.14(b) . . . , except the portions of TSU described in 740.13(a,b,c).

744 Supplement No. 3:

. . . Canada . . . ~~(includes San Marino and Holy See)~~

746 Structure:

(Logically license requirements and licensing policy for embargoed countries should be moved from 746 to 742, CCL-based controls, since EAR99, in addition to ECCNs, is on the CCL and exceptions from license requirements should be moved from 746 to 740, since some relevant conditions are now in 740 and others in 746. Alternatively, 742.10, re Sudan, should logically be moved to 746, since Sudan is now an embargoed country.)

746.1(a):

. . . general embargoes, currently, Cuba, Libya, North Korea, Iran ~~and~~, Iraq, Sudan, Serbia less Kosovo, and Taliban controlled areas of Afghanistan.

746.1(a)(2) Iran, ~~and~~ Iraq, Sudan, Serbia less Kosovo, and Taliban-controlled areas of Afghanistan . . . Iran and Iraq and Sudan . . .

746.1(b):

Rwanda and Serbia & Montenegro. The second category of controls that apply to Rwanda and Serbia & Montenegro . . .

Such controls are listed in 746.8 and 746.9. The items affected are also identified under each ~~affected~~ applicable ECCN on the CCL in part 774 of the EAR

746.1 add:

(g) Provisions in 740.1(b-f) and 740.2 apply to License Exceptions set forth in part 746.

746.2(a) intro:

. . . you will need a BXA license to export or reexport all items subject to the EAR (see part 734 of the EAR for the scope of items subject to the EAR) to Cuba, except as follows (OFAC controls reexports to Cuba by a person subject to U.S. jurisdiction, whether or not the item is of U.S.-origin. To avoid duplication, sn authorization from OFAC constitutes authorization under the EAR, and no separate BXA authorization is necessary):

746.2(a)(1):

(i) . . . or from Canada through the United States(740.9 (b)(1)(iv))

. . .

(x) Aircraft and Vessels (AVS) ~~for certain aircraft on temporary sojourn~~ (see 740.15 ~~(a)~~of the EAR; for limitations applicable to Cuba see 740.15(a)(1)(i),(ii), (a)(2)(ii), (a)(3)(iv-ix), (b)(1), and (b)(2)).

(xi) The portions of additional permissive reexports (APR) described in 740.16(c, d, e, and h)

(For consistency with 771A.26(a)(3), 774A.2(b,c,g), 740.11(a)(1)(iii), 740.15, and 740.16)

746.2(b):

. . .

(2) Telecommunications ~~commodities~~ items may be authorized on a case-by-case basis, provided the ~~commodities~~ items are part of an FCC-approved project . . .

~~(3)(iii)(D)~~ (4) ~~(D)~~ Your transaction is for the export of donated food

(Donations of food is not a subset of foreign-made products that contain an insubstantial U.S.-origin content)

(5) Multiple gift parcels may be authorized (see 748 Supplement 2 (d)).

746.2(d):

OFAC maintains controls on the activities of persons subject to U.S. jurisdiction, wherever located, involving transactions with Cuba or any specially designated Cuban national, as provided in 31 CFR part 515. Treasury defers to Commerce for exports of U.S.-origin to Cuba (31 CFR 515.533). Commerce defers to Treasury for reexports of non-U.S.-origin to Cuba by persons subject to U.S. jurisdiction located abroad.

(Assumes "from the United States" in 31 CFR 515.533 is intended to include reexports of U.S.-origin items)

746.3(a):

. . . The Government of Iraq. Excepted from OFAC controls are transactions for the official use of the United Nations, its personnel and agencies (excluding its relief or developmental agencies) and transactions of common carriers for the receipt or transmission of telecommunications between the United States and Iraq (31 CFR 575.205, 575.507, 575.513).

746.3(a)(1), omission of the following eligibility for Iraq may be inadvertent:

— TMP news media
— TMP from Canada through the United States
— RPL parts
  GOV U.S. Government
— GOV international safeguards
  GOV Chemical Weapons Convention
— TSU operation technology and software
— TSU sales technology
— TSU software updates
— GFT gifts and humanitarian donations
  BAG baggage

746.4(b)(1)

. . . (including transshipments) to Libya. Transshipments are reexports intended at the time of export from the United States to be destined to Libya. Transshipments do not include

items substantially transformed in third countries except for items to be used in Libya in the petroleum or petrochemical industry (31 CFR 550.409) . . .

(iv) Transactions of common carriers for the receipt or transmission of telecommunications between the United States and Libya (31 CFR 550.502, 550.504, 550.510)

746.4(b)(2)(ii):

(A) . . . or from Canada through the United States (740.9(b)(1)(iv))

. . .

(G) Aircraft and Vessels (AVS) ~~for vessels only~~ (see 740.10 ~~(c)(1)~~ of the EAR; for limitations applicable to Libya see 740.10(a)(1)(i),(ii), (a)(2)(ii), (a)(3)(iv-ix), and (b)(2)).

. . .

(J) The portions of additional permissive reexports (APR) described in 740.16(c, d, e, and h) (see 740.11 of the EAR).

746.4(c)(2)(i):

Items controlled for national security ~~and related~~ , including technology and software-, and including controlled foreign produced products of U.S. technology . . .

746.5(a) intro:

. . . you will need a BXA license to export or reexport all items subject to the EAR (see part 734 of the EAR) to North Korea, except as follows (OFAC controls reexports to North Korea by a person subject to U.S. jurisdiction, whether or not the item is of U.S.-origin. To avoid duplication, sn authorization from OFAC constitutes authorization under the EAR, and no separate BXA authorization is necessary):

746.5(a)(1):

(i) . . . or from Canada through the United States (740.9(b)(1)(iv))

. . .

(vii) Aircraft and Vessels (AVS) ~~for fishing vessels under governing international fishery agreements and foreign registered aircraft on temporary sojourn in the U.S.~~[1] (see 740.15 ~~(a) and (c)(1)~~ of the EAR ; for limitations applicable to North

Korea see 740.10(a)(1)(i),(ii), (a)(2)(ii), (a)(3)(iv-ix), (b)(1), (b)(2), (c)(1), (c)(2), and (c)(2)(ii)).

. . .

(x) The portions of additional permissive reexports (APR) described in 740.11(c, d, e, and h) (see 740.11 of the EAR). Footnote 1. Export of U.S.-registered aircraft on temporary sojourn ~~or vessels~~ is prohibited. 44 CFR Ch. IV, Part 403 "Shipping restrictions: North Korea (T-2)."

746.5(b) add:

(3) Multiple gift parcels may be authorized (see 748 Supplement 2 (d)).

746.5(d):

OFAC maintains controls on the activities of persons subject to U.S. jurisdiction, wherever located, involving transactions with North Korea or any specially designated North Korean national. Treasury defers to Commerce for exports of U.S.-origin to North Korea (31 CFR 500.533). Commerce defers to Treasury for reexports of non-U.S.-origin to North Korea by persons subject to U.S. jurisdiction located abroad.

746.6 add new section:

Anti-terrorism controls.

(a) General license requirements.

(1) All items controlled for NS, MT, NP, or CB reasons plus items specified under EAR99 entries on the CCL as controlled for AT (anti-terrorism) reasons require a license for export or reexport for anti-terrorism reasons to Cuba, North Korea, Libya, Iran, Iraq, Sudan, and Syria.

(2) See 746.2, 746.3, 746.4, 746.5, 746.6, and 746.7 for other controls on exports or reexports to Cuba, Iraq, Libya, North Korea, Iran, and Sudan and for the types of transactions under the licensing authority of the Treasury Department, Office of Foreign Assets Control (OFAC), for those countries. Authorization from OFAC constitutes authorization under the EAR and no separate license orauthorization from BXA is required.

(3) The items specified under EAR99 entries on the CCL with AT as the reason for control are given identifying numbers xx99x, which are similar to, but not the same as, ECCN numbers. The proper classification for these items is EAR99.

(4) See 746.6(b) and 746 Supplement No. x for variations on EAR99 anti-terrorism controls for Iran, Sudan, and Syria.

(5) Although the United States seeks cooperation from like-minded countries in maintaining anti-terrorism controls, at this time these controls are maintained only by the United States.

(b) Iran, Sudan, and Syria license requirements.

(1) In support of U.S. foreign policy on terrorism-supporting countries, BXA maintains two types of anti-terrorism controls on export and reexport to Iran, Sudan, or Syria (Supplement No. x to part 746 contains a description of these items):

(i) Items described in paragraphs (c)(1) through (c)(5) of Supplement No. x to part 746 are controlled under section 6(j) of the Export Administration Act, as amended (EAA), if destined to military, police, intelligence or other sensitive end-users in Iran, Sudan, or Syria.

(ii) Items described in paragraphs (c)(1) through (c)(5) of Supplement No. x to part 746 if destined to non-sensitive end-users, as well as items described in paragraphs (c)(6) through (c)(39) of that Supplement to all end-users are controlled under section 6(a) of the EAA, except that (c)(15) is not controlled to Sudan and (c)(9), (15), (20), and (21) are not controlled to Syria.

(2) Some commodities are controlled for export, but not for reexport, to Iran, Syria, or Sudan. However, the export from the United States to any destination of any of these commodities with knowledge that they will be reexported directly or indirectly, in whole or in part, to a destination to which export is controlled is prohibited without a license. The countries affected, the general subject

matter of the affected commodities (n.e.s. means not elsewhere specified), and the numbers assigned to them in Supplement No. x to part 746 are as follows:

(i) Controlled for export but not for reexport to Iran and for neither export nor reexport to Sudan or Syria:

portable electric generators, (c)(15), 2A994;

(ii) Controlled for export but not for reexport to Iran and Sudan and for neither export nor reexport to Syria:

(A) information security systems, n.e.s,(c) (10), 5A992;

(B) acoustic equipment, n.e.s, (c)(14), 6A 991;

(C) boats and marine engines, n.e.s, (c)16 and (17), 8A992; and

(D) diesel engines, n.e.s., (c)(9), 9A990.

(iii) Controlled for export, but not for reexport, to Iran and Sudan and for both export and reexport to Syria:

(A) electronic test equipment, n.e.s., (c)(12), 3A992.a;

(B) mobile telecommunications equipment, n.e.s., (c)(13), 5A991.f;

(C) airborne radar equipment, n.e.s., (c)(11), 6A998;

(D) avionic equipment, n.e.s., (c)(11), 7A 994;

(E) underwater cameras and submersible systems, n.e.s., (c)(18) and (19), 8A992;

(F) off-highway wheel tractors, (c)(8), 9A 990;

(G) aircraft parts and components, n.e.s., (c)(6), 9A991.e.

(3) Scuba gear, (c)(20), 8A992.h, is controlled for export and reexport to Iran and Sudan but for neither export nor reexport to Syria.

(4) None of the twelve items listed in 746.6(b)(1) and (2) to Iran or Sudan are counted as controlled content for the purpose of determining whether U.S. parts, components, or materials incorporated in foreign-made products are subject to the EAR (see 734.4 and 734 Supple-

ment No. 2) and 6A998, 7A 994, and 9A991.d are not counted as controlled content for this purpose to Syria

(c) Iran, Sudan, and Syria licensing policy.

(1) General.

(i) Licensing policies for each of the anti-terrorism controls affecting Iran, Sudan, or Syria, including contract sanctity dates, are described in Supplement No. x to part 746. Applicants who wish a pre-existing contract to be considered must submit sufficient documentation to establish the existence of a contract.

(ii) License applications for items reviewed under 6(a) controls will also be reviewed to determine the applicability of 6(j) controls to the transaction. When it is determined that an export or reexport could make a significant contribution to the military potential of Iran, Sudan, or Syria, including its military logistics capability, or could enhance Syria's ability to support acts of international terrorism, the Secretaries of State and Commerce will notify the Congress 30 days prior to issuance of a license.

(2) Iran. The Iran-Iraq Arms Non-Proliferation Act of October 23, 1992, requires BXA to deny licenses for items controlled to Iran for national security reasons (section 5 of the 1979 EAA) or foreign policy reasons (section 6 of the 1979 EAA), absent contract sanctity or a Presidential waiver. License applications for which contract sanctity is established may be considered under policies in effect prior to the enactment of that Act. Otherwise, licenses for such items to Iran are subject to a general policy of denial.

(3) Sudan and Syria. Notwithstanding the denial policies described in Supplement No. x to part 746, applications for Sudan or Syria will be considered on a case-by-case basis if:

(i) The U.S. content of foreign-produced commodities is 20% or less by value; or

(ii) The commodities are medical items.

Note: Applicants who wish any of the factors described in 746.6(b)(3) to be considered in reviewing their license applications must submit adequate documentation demonstrating the date of export from the United States, the value of U.S. content, or the specifications and medical use of the item.

746.7(a)(1)

(i) You should consult with OFAC if: (redesignate i, ii, iii as A, B, C)

(ii) Excepted from OFAC controls are:

A. Gifts to persons valued at not more than $100;

B. Baggage normally incident to travel accompanying persons leaving the United States for Iran; and

C. Transactions of common carriers for the receipt or transmission of telecommunications between the United States and Iran

(31 CFR 560.204, 560.506, 560.507, 560.508)

746.7(a)(1)(ii) (revised to (i)(B) per above):

. . . from a third country or to export or reexport to any destination any item of Iranian origin or owned or controlled by the Government of Iran (31 CFR 560.206)

746.7(a)(1)(iii) . . . , namely, . . .

(Reexporters need to know which items "were subject to any export license application requirements prior to Executive Order 12959 of May 6, 1995" in order to determine whether to apply for a Treasury or a Commerce license.)

746.7(a)(2)(i):

. . . ~~CC Column 3~~ . . . 0A986, 0A988, 0A989, 0B986, 1C991, 1C995, 1C998,' 2A994, 2D994, 2E994

746.7(a)(2), eligibility for the following License Exceptions for Iran may be inadvertently omitted:

— TMP news media,

— TMP from Canada through the United States,
— RPL parts
— GOV U.S. Government,
— GOV international safeguards
GOV Chemical Weapons Convention
— TSU operation technology and software
— TSU sales technology
— TSU software updates
BAG baggage
GFT gifts and humanitarian donations

746 Supplement 1 - renumber as 746.10

746 Supplement 1(a) (to become 746.10(a)):

. . . arms and related material ~~of all types, including weapons and ammunition, military vehicles and equipment and spare parts,~~ (defined in Appendix A to 31 CFR 590 to include specified items on the Commerce Control List) and petroleum and petroleum products . . .

746 Supplement 1(b) (to become 746.9(b)):

Exporters should apply to OFAC for authorization to export ~~embargoed~~ the following items to UNITA or to points of entry not designated by the Secreatry of the Treasury:

— construction equipment built to military specifications, specially designed for airborne transport 0A018.b;
— specially designed components and parts for ammunition 0A018.c;
— bayonets and muzzle-loading (black powder) firearms 0A018.d and e;
— non-military shotguns 0A984;
— shotgun shells and parts 0A986;
— equipment for the production of military explosives and solid propellants 1B018.a;
— spindle assemblies 2B998;
— equipment for the manufacture of arms 2B018 and 0B986;
— submarine and torpedo nets 8A018.b.5;
— vehicles specially designed for military purposes

9A018.b;
— pressure refuelers 9A018.c;
— military parachutes 9A018.e;
petroleum and petroleum products 1C980 to 1C984 and EAR99

748.9(a)(1):

. . .
Anguilla
Antigua & Barbuda
. . .
British Virgin Islands
. . .
Caymans
. . .
Dominica
. . .
~~French West Indies~~
. . .
Grenada
Guadeloupe
. . .
~~Leeward and Windward Islands~~
Martinique
. . .
Montserrat
. . .
St. Kitts & Nevis
St. Lucia
St. Vincent & Grenadines
. . .
Turks & Caicos

748.12(b):

Reexports. If a support document would be required for an export from the United States, the same document would be required for reexport of a U.S.-origin item to ~~Country Group D:1 and E:2~~ countries marked with an "x" in NS Column 3 (see Supplement No. 1 to part ~~740~~ 738 of the EAR)

748.13 move entire section to part 750

748.13(a)(1):

BXA may request ~~applicants~~ license recipients to obtain verifications of delivery . . .

748 Supplement 1:

. . .

Block 5: . . . If ~~the~~ U.S.-origin items are located outside the United States . . .

. . .

Block 18: . . . If your application is for the reexport of U.S.-origin items previously exported . . .

. . .

Block 20: . . . If your application involves the reexport of U.S.- origin items previously exported . . .

748 Supplement 2(c):

Digital computers, telecommunications, and related equipment. If your license application involves items controlled by both Category 4 and Category 5, your license application ~~must be submitted according to the principal function of the equipment~~ will be evaluated against the performance characteristics of both Categories. License applications involving digital computers ~~controlled by Category 4~~ must identify a Composite Theoretical Performance (CTP) in Block 22(b). ~~If the principal function is telecommunications, a CTP is not requied. Computers, related equipment, or software performing telecommunication or local area network functions will be evaluated against the telecommunications performance characteristics of Category 5, while cryptographic, cryptoanalytic, certifiable multi level security or certifiable user isolation functions, or systems that limit electromagnetic compatibility (EMC) will be evaluated against the information security performance characteristics of Category 5.~~

748 Supplement 2(p):

Temporary exports or reexports. If you are submitting a license application for the temporary export or reexport of an item (not eligible for License Exception TMP (See 740.8 of

the EAR)) the usual support documents are not required but you must include the following certification in Block 24: . . .

748 Supplement 2(e)(4):

Any support documentation required by 748.9 of this part for the country of ultimate destination, except for a shipment originating in Canada.

750.1:

. . . This part describes the ~~Bureau of Export Administration's (BXA)~~ process for reviewing your applications for a license, including processing times, and for denials, ~~revocations,~~ issuances, replacements, revocations, suspensions, duplicates, transfers, and shipping tolerances on approved licenses.

750.3(b):

. . . Delegation of Authority to process those license applications without review by that particular agency and BXA will make such information publicly available.

750.4(a)(2):

. . . The specific deficiencies requiring a return , including a BXA determination that a license is not required, will be ~~enumerated~~ identified in a notice accompanying the returned license application. . . .

750.4(b)(6):

Congressional notification for anti-terrorism cases. . . .

750.4(b) add:

(7) Congressional notification for crude oil and refined petroleum. Pursuant to section 7(d) and 7(e) of the Export Administration Act, Congress must be notified 60 days before issuance of a license for certain crude oil and 30 days before issuance of a license for certain refined petroleum products.

750.6:

Denial or conditional approval of license applications.

(a) Notification of ~~I~~ intent to deny or to approve with conditions ~~notification~~. If BXA intends to deny your license

application or to approve it with conditions, BXA will notify you ~~within 5 days of the decision~~ before acting on the application. The notification will include.

(1) ~~The intent to deny decision~~ A description of the intent;

(2) The statutory and regulatory basis for ~~the~~ denial or for the intended conditions;

(3) . . . the specific considerations that led to the ~~decision~~ intent to deny the license application or to approve it with conditions;

. . .

(b) Response to ~~intent to deny~~ notification of intent to deny or to approve with conditions. You will be allowed ~~20 days~~ 30 days from the date of the notification to respond ~~to the decision~~ before the license application is denied or approved with the intended conditions. If you respond to the notification, BXA will advise you ~~if~~ whether or not, as a result of your response, the ~~decision~~ intent to deny or to approve with conditions has been changed. ~~Unless you are so advised by the 45th day after the date of the notification, the denial will become final, without further notice~~. You will then have 45 days from the date of ~~final denial~~ this BXA advice to exercise the right to appeal under part 756 of the EAR.

750.7(b):

. . . ~~Where appropriate, t~~ The license will also show an expiration date.

750.7(g):

. . . "emergency" (See ~~748.5(g)~~ 748.4(h) of the EAR) . . .

750.7(i):

Records. If you have been issued a license you must retain ~~the license~~ it (whether used or unused, valid or expired) and maintain complete records in accordance with part 762 of the EAR including ~~any licenses(whether used or unused, valid or expired) and~~ all supporting documents and shipping records.

750.8(a):

All licenses for exports or reexports are subject to revision, suspension, or revocation, in whole or in part, without advance notice whenever it is known that the EAR have been violated or that a violation is about to occur.

750.10:

Transfers of licenses for exports and reexports.

(a) Authorization. As the licensee for a reexport, you may transfer a license to a transferee who is a principal party in interest and who will assume all powers and responsibilities under the license for the control of the shipment. As the licensee for an export from the United States, you may not transfer a license ~~issued for the export of items from the United States~~ to any other party, . . .

750.10(b)(2)(vi):

~~If the license is to be transferred to a subsidiary or firm, or if you transferee all, or a substantial portion, of your assets or business, the transferee must certify t~~That the legal authority changing the exporter imposes on the transferee the responsibility to accept and fulfill the obligations of the transferor under the transactions covered by the license; and

750.11:

(a)(2) . . . whether that be ~~Number, Dollar Value, or Area, Weight, or other Measure~~ number, dollar value, area, weight, or other measure. . . .

(b) . . . one for items licensed by ~~"Dollar Value"~~ dollar value, one for items licensed by ~~"Number"~~ number, and another a third for items licensed by ~~"Area, Weight or other Measure"~~ area, weight, or other measure.

(1) Items licensed by ~~"Dollar Value"~~ dollar value. If the ~~"Unit"~~ Unit paragraph in the ECCN applicable to your item reads ~~"& value"~~ "$ value" or ~~"in & value"~~ "in $ value", . . .

(2) Items licensed by ~~"Number"~~ number. If the ~~"Unit"~~ Unit paragraph in the ECCN applicable to your item reads ~~"Number"~~ "number" or ~~"in Number"~~ "in number", . . .

(3) Items licensed by ~~"Area, Weight or Measure~~ area, weight, or other measure. If the "Unit" Unit . . .

752.2(a):

(1) ~~Exporting items~~ Exports subject to the EAR ~~as~~ of spare and replacement parts . . .

(2) ~~Exporting and reexporting items~~ Exports or reexports subject to the EAR of items . . .

(3) ~~Exporting and reexporting items~~ Exports or reexports subject to the EAR of items . . .

752.3(a):

All items ~~subject to the EAR~~, . . .

752.5(c)(8)(iii):

. . . items controlled for nuclear nonproliferation reasons described in ~~744.2 of the EAR~~ ECCNs on the CCL . . .

752.6(a)(1)

Reexports for which the Country Chart (see Supplement No. 1 to part 738) does not require a license or that qualify for a License Exception authorized by part 740 of the EAR.

752.8(b):

. . . If BXA cannot verify that an ~~appropriate~~ adequate ICP will be implemented . . .

752.9(a)(4):

. . . You must inform ~~all relevant~~ consignees of all license conditions relevant to them prior to making any shipments under the SCL.

754 Move this entire part to 742, CCL-based controls, except for the descriptions of SPR, SS-SAMPLE, and WRC License Exceptions, which would be moved to 740 or to ECCNs 1C981 and 1C988, respectively.

754.1(c):

Reexports. Reexports of items controlled by this part require a license from BXA only if such a requirement is specifically set forth in ~~this~~ part 746 or is set forth on the license authorizing the export from the United States.

754.1(d):

Additional requirements for embargoed destinations. For exports involving embargoed destinations, you must satisfy the requirements of this part and also of part 746 of the EAR (Embargoes and Other Special Controls). In addition, OFAC controls affect short supply items to embargoed destinations and petroleum and petroleum products to UNITA (Angola), including reexports of foreign origin items by U.S. persons (31 CFR 590.201).

754.1 add:

(e) Applicability of other General Prohibitions. General Prohibitions Four, Nine, and Ten (736.2(b)(4), (9), and (10)) apply to exports of short supply items.

(f) The provisions of 740.1(b), (c), (d)(1), & (f) and 740.2(a)(1-4) & (b) apply to License Exceptions set forth in part 754.

(g) Short supply items are eligible for the portion of License Exception TUS described in 740.4(b)(3) and (4).

(h) Short supply License Exception codes must be entered on SEDs.

754.4(b)(3):

(3) ~~BXA will approve license applications for unprocessed western red cedar timber harvested from public lands in Alaska, private lands, and Indian lands. Applications must be submitted in accordance with the procedures set forth in paragraph (a) of this section.~~ See paragraph (c) of this section for the availability of a License Exception.

754.4(d) reletter (e) and insert:

(d) The portion of License Exception GOV for official use of U.S. Government agencies (see 740.6(b)) applies to ECCN 1C988 exports or reexports to any destination.

754.5 add:

(c) The portion of License Exception GOV for official use of U.S. Government agencies (see 740.6(b)) applies to ECCN 0A980 exports to any destination.

PART 756 - APPEALS FROM ADMINISTRATIVE (NON-ENFORCEMENT) ACTIONS

756.1(a):

(1) Issuance, amendment, ~~revocation,~~ or ~~appeal~~ repeal of a regulation. (~~These requests~~ Proposals for regulatory revisions may be submitted to BXA at any time.)

(2) Denial order, ~~or~~ probation orders, civil penalt~~ies~~y, sanctions, or other actions under parts 764 and 766 of the EAR.

756.2(b)(4)(ii):

. . . evidentiary material deemed by the Under Secretary to be relevant and material to the proceeding, and not unduly repetitious, will be received and ~~given appropriate weight~~ considered.

756.2(b)(4)(v):

. . . that official will submit a written report containing a summary of the hearing and recommended action to the Under Secretary, with a copy to the appellant.

756.2(c)(2):

. . . The decision of the Under Secretary shall be the final administrative action.

758.1 insert at the beginning:

Export clearance requirements imposed by the EAR do not apply to exports or reexports not subject to the EAR because of inclusion in the list of exceptions in 734.3(b) or other activities not subject to the EAR because of omission from 734.5.

758.1(a)(4):

License Exception group symbol. Entering a License Exception group symbol on an export control document is a representation to the U.S. Government that the transaction meets all of the terms and conditions of the applicable portion of the License Exception group symbol cited. (See parts 740, 744, 746, and 754 of the EAR for details regarding License Exceptions.)

758.1(d):

Exports from the United States by U.S. Mail

(1) Exports made under a license issued by BXA. Before making an export of a commodity by U.S. Mail . . .

(2) Shipments without a license. The requirements of this paragraph apply whenever you export ~~items~~ commodities that do not require a license under the EAR. These requirements apply regardless of whether your transaction does not require a license because the ~~item~~ commodity you are going to ship is encompassed with EAR99 (See 734.3(c) of the EAR entitled "Scope of the EAR"), because the ~~item~~ commodity, although on the list, does not require a license to be exported to the destination to which you intend to ship, or because the transaction qualifies for a License Exception as described in part 740, 744, 746, or 754 of the EAR.

. . .

(iii) Shipments valued over $500. When mailing a ~~item~~ commodity from one business concern to another where the total value of the ~~items~~ commodities being shipped exceeds $500 . . .

(iv) Designation on SED and/or parcel. If you are exporting an ~~item~~ commodity that is encompassed within EAR99 . . . or you are exporting pursuant to a License Exception, as described in parts 740, 744, 746, or 754 of the EAR, you must enter the appropriate symbol indicating the absence of a license requirement, either NLR, meaning "No License Required", or the applicable License Exception group symbol, on the SED and on the address side of the parcel, along with the phrase "Export License Not Required." If your transaction is one for which you are not required to file a SED, you must enter the appropriate symbol, either NLR~~, meaning no license required~~ or ~~of~~ the applicable License Exception group symbol, . . .

(A) By entering the symbol NLR, you are representing to the U.S. Government that the ~~items~~ commodities you are exporting . . . and that the ~~item~~ export is subject to the EAR.

(B) By entering a License Exception group symbol, you are representing to the U.S. Government that your transaction meets all of the terms and conditions of the applicable portion of the License Exception group you are ~~using~~ citing. (See parts 740, 744, 746, and 746 of the EAR for details regarding License Exceptions.).

. . .

~~(v) Gift parcels. If you are sending a gift parcel pursuant to the requirements of 746.16 of the EAR, you must enter the phrase "Gift export license not required" on any customs declaration documents and on the address side of the parcel.~~

(vi) Software and technology. If ~~you are exporting~~ your export of software or technology~~, the export of which is authorized under the License Exceptions in 740.17 through 740.21 if~~ is subject to the EAR, you do not need to make any notation on the package. If ~~you are exporting~~ your export of software or technology ~~that is outside the scope of~~ is not subject to the EAR, check to see if any other agency's regulations require specific markings on the package.

758.1(e):

Exports by means other than U.S. Mail. If your export requires a license, you must enter the information specified in 758.3(h)(1) on the Declaration. If you are exporting an item that does not require a license but does require a Declaration, you must enter the three-letter symbol indicating why a license is not required, along with the phrase "Export License Not Required".

758.3(f)(1):

. . . ~~For the second and subsequent authorizations used~~ In that event, the applicable license ~~number and expiration date~~ information per 758.3(h)(1), License Exception symbol, or the "No License Required" symbol (NLR) must be shown along with the descriptions (including quantity, if required, Schedule B Number, and value) to which each authorization ~~license or provision excepting from the license requirement~~

applies, in the designated spaces on a separate SED Continuation Sheet. . . .

(ii) Entering a License Exception symbol, or "NLR" is a representation to the U.S. Government that the shipment meets one of the applicable provisions of paragraph (a)~~(3)~~ of 758.1 of this part.

758.3(g)(3):

. . . you must enter a description in sufficient detail to permit ~~review~~ verification by the U.S. Government ~~and verification~~ of the Schedule B number entered on the SED.

758.3(h)(2):

Exports not needing a license. In addition to the item description, the appropriate License Exception group symbol, or the "No License Required" symbol (NLR) . . .

758.3(i)(5):

. . . complies with the provisions of 750.7(c)(1)(vi) of the EAR dealing with continuity of shipments . . .

758.3(m)(3)(ii):

. . . one of the following statements, whichever is ~~appropriate~~ applicable, must be entered: . . .

758.3(m)(3)(iii):

. . . including the ~~appropriate~~ applicable Schedule B number.

758.3(o)(3)(ii)(2)

Actual receipt of the export license, if required, before the shipment is exported, except as provided in 748.4(h)(4);

758.5(c)(2)(ii)(B):

. . . of this part or a country qualifying under 758.5(c)(2)(i).

758.6(a)(1):

The destination control statement . . . covering ~~any~~ an export from the United States if:

. . .

758.9:

Other applicable U.S. laws and regulations

762.1(a):

The recordkeeping provisions of this part apply to the following transactions, if subject to the EAR per 734.3 or 734.5:

. . .

(2) Exports of commodities, software, or technology from the United States and any known reexports, transshipment, or diversions of items originally exported from the United States, unless the transaction does not require a license, does not require a SED, and does not require a DCS;

. . .

(4) Any ~~other~~ transactions subject to ~~the EAR, including, but not limited to,~~ the prohibitions against servicing, forwarding and other actions for or on behalf of end-users of proliferation concern contained in 734.2(b)(7) and 744.6 of the EAR. . . .

762.2:

Records required to be retained.

(a) ~~Records required to be retained~~ General. The types of records required to be retained ~~under this part 762 include the following~~ are as follows: . . .

(b) Records retention references. ~~Paragraph (a) of this section describes records that are required to be retained.~~ Other parts, sections, or supplements of the EAR ~~which require the retention of records or contain recordkeeping provisions, include, but are not limited to the following~~ provide additional detail concerning records to be retained, as follows:

~~(1) Part 736, General Prohibitions;~~
~~(2) 732.6, Steps for other requirements;~~
~~(3) 740.1, Introduction (to License Exceptions);~~
. . .
(6) ~~740.7~~ 740.12(b)(7) Humanitarian donations ~~(NEED)~~;
. . .
~~(14) 748.2(c), Obtaining forms, mailing addresses;~~
. . .
~~(16) 750.8 Revocation or suspension of license;~~
. . .
~~(24) 752.13 Inspection of records;~~
. . .

~~(33) 762.2 Records to be retained;~~

. . .

~~(36) 766.10 Subpoenas.~~

762.3(a)(9) Notification to customer of advance ~~meeting~~ mailing.

762.6(a)(2):

Any known reexport, transshipment, or diversion of ~~such~~ a U.S.-origin item;

762.6(a) add:

(5) Completion of activity prohibited without a license by 736.2(b)(7) and 744.6.

762.6(b):

~~Destruction or disposal of records~~ Retention for longer than five years.

Records must be retained for a period of time exceeding that required by paragraph (a) of this section under either of the following circumstances:

(1) If the Bureau of Export Administration or any other U.S. government agency makes a formal or informal request for a certain record or records, such record or records may not be destroyed or disposed of without the ~~written~~ authorization of the agency concerned, which authorization must be in writing if the request was in writing.

(2) ~~This prohibition applies to records pertaining to~~ The person making a voluntary disclosure~~s made~~ to ~~BXA~~ OEE must retain relevant documents not attached to the narrative account until OEE requests them or a final decision on the disclosed information has been made, in accordance with ~~765.5(c)(4)(ii)~~ 764.5(c)(4)(ii) ~~and other records even if such records have been retained for a period of time exceeding that required by paragraph (a) of this section~~.

762.7(b):

. . . or by any other accredited representative of the U.S. Government, without any charge or expense to such agent, official ~~or~~, employee, or representative.

764.2(a):

> . . . or any order, license or authorization issued thereunder in the absence of an exception to such prohibition or requirement in the EAR or a license or other authorization issued by BXA, except for non-material license changes listed in 750.7(c)(1) through (8) or 752.10(c).

764.2(b):

> . . . No person may cause or aid, abet, counsel, command, induce, procure, or permit the doing of any ~~net prohibited, or the omission of any act required, by the EAA, the EAR, or any order license or authorization issued thereunder~~ conduct described in 764.2(a).

764.2(f):

> . . .
>
> (1) With intent to export or reexport such item in violation of . . .
>
> (2) With knowledge ~~or reason to believe~~ that the item would be so exported or reexported.

764.2(g)(1)(ii):

> In connection with the preparation, submission, issuance, use, or maintenance of any "export control document ," as defined in part 772 of the EAR; document related to activities described in 736.2(b)(7) and 744.6; or restrictive trade practice or boycott request report, as defined in 760.6 of the EAR; or

764.2(g)(2):

> . . . any material change or any ~~material~~ fact . . . a material change of ~~material~~ fact . . .

764.2(i):

> . . . No person may fail or refuse to comply with any reporting or recordkeeping requirement of the EAR or of any order license or authorization issued thereunder, although the inadvertent destruction, loss, or misplacement of a document concerning a legal export will not give rise to 764.3 sanctions.

764.3(a)(2) Option 1:

Denial of export privileges. An order may be issued that restricts the ability of the named persons to engage in export ~~and~~ or reexport transactions ~~involving items~~ subject to the EAR, or that restricts access by named persons to items ~~subject to the EAR~~ obtained through such transactions. . . . An order denying export privileges . . . may deny or restrict exports and reexports subject to the EAR by or to such person ~~of any item subject to the EAR~~, and may restrict dealings in which that person may benefit from any such export or reexport ~~of such items~~.

764.3(a)(2) Option 2:

Denial of export privileges. An order may be issued that restricts the ability of the named U.S. persons to engage in export ~~and~~ or reexport transactions ~~involving items subject to the EAR~~ requiring a license or a License Exception, or that restricts access by named persons to items ~~subject to the EAR~~ obtained through such transactions. . . . An order denying export privileges . . . may deny or restrict exports and reexports by or to such person ~~of any item subject to the EAR~~ requiring a license or a License Exception, and may restrict dealings in which that person may benefit from any such export or reexport ~~of such items~~.

764.3(a)(2) Option 3:

Denial of export privileges. An order may be issued that restricts the ability of the named U.S. persons to engage in export ~~and~~ or reexport transactions involving items subject to the EAR requiring a license, or that restricts access by named persons to items ~~subject to the EAR~~ obtained through such transactions. . . . An order denying export privileges . . . may deny or restrict exports and reexports by or to such person ~~of any item subject to the EAR~~ requiring a license, and may restrict dealings in which that person may benefit from any such export or reexport ~~of such items~~.

764.3(a)(2) Option 4 deletion

(The only explicit authority in the EAA to deny to violators permission to export is in Section 11(c)(2)(A). That

authority is limited to suspending or revoking the authority of any United States person to export goods or technology. The generally understood means of providing authority to export is a license. EAR provisions referring to the possible suspension or revocation of License Exceptions might be interpreted as an additional such authority. The EAR does not mention the possibility of suspending or revoking permission to export or reexport under NLR provisions. EAA Section 11(c)(2)(A) is limited to anti-boycott violations under section 8(a). There is no comparable authority in the EAA to suspend or revoke the authority of persons violating sections 5, 6, or 7, concerning national security, foreign policy, or short supply controls. Regarding export as a privilege is inconsistent with EAA section 4(d), which is entitled "Right of Export." Section 4(d) states: "No authority or permission to export may be required under this Act, or under regulations issued under this Act, except to carry out the policies set forth in section 3 of this Act." Section 3(2), states the policy to use export controls "only to the extent necessary" for national security, foreign policy, or short supply purposes.)

764.3(a)(3):

Exclusion from practice. Any person acting as an attorney, accountant, consultant, freight forwarder, or any other representative capacity for any license application or other matter before BXA <u>who violates any law, regulation, order, or license relating to export controls or restrictive trade practices and boycotts</u> may be excluded by order from any or all such activities before BXA.

764.3(b):

(1) . . . more than five times the value of the exports <u>or reexports</u> involved . . .

(2)(i) . . . the exports <u>or reexports</u> involved . . . value of the export <u>or reexport</u> involved . . .

(2)(ii) . . . for the export <u>or reexport</u> of any items . . .value of the exports <u>or reexports</u> involved . . .

(2)(iii) . . . with intent to export or reexport . . . or knowing ~~or having reason that believe~~ that the item would be so exported or reexported . . .

764.3(c)(1):

Statutory sanctions. . . . restrict imports and procurement (See . . . and the Nuclear Proliferation Prevention Act) . . .

764.5(c)(4)(ii):

. . . the documents should be ~~handled~~ maintained in accordance with the recordkeeping rules . . .

764.5(d):

. . . take whatever action, including further investigation, it deems ~~appropriate~~ warranted. . . .

764 Supplement No. 1 (b) - Option 1:

Standard text.

. . .

First, that (the denied person(s)) may not, directly or indirectly, participate in any way in any transaction involving any commodity, software or technology (hereinafter collectively referred to as "item") exported or to be exported from the United States that is ~~subject to the Export Administration Regulations (EAR)~~ on the Commerce Control List, including EAR99, or in any other activity subject to the EAR, including, but not limited to:

A. Applying for, obtaining, or using any license, License Exception, or export control document;
B. . . . any transaction involving any ~~item exported or to be exported~~ export or prospective export from the United States that is subject to the EAR, or in any other activity subject to the EAR; or
C. Benefiting in any way from any transaction involving any ~~item exported or to be exported~~ export or prospective export from the United States that is subject to the EAR, or in any other activity subject to the EAR.

Second, that no person may, directly or indirectly, do any of the following:

A. Export or reexport to or on behalf of the denied person any item ~~subject to the EAR~~ on the Commerce Control List, including EAR 99;

B. . . . any item ~~subject to the EAR~~ on the Commerce Control List, including EAR 99 . . .

C. . . . any item ~~subject to the EAR~~ on the Commerce Control List, including EAR 99 . . .

D. . . . any item ~~subject to the EAR~~ on the Commerce Control List, including EAR 99 . . .

E. . . . any item ~~subject to the EAR~~ on the Commerce Control List, including EAR 99 . . .

. . . any item ~~subject to the EAR~~ on the Commerce Control List, including EAR 99 . . .

. . .

Fourth, that this order does not prohibit any export, reexport, or other transaction subject to the EAR where the only items involved ~~that are subject to the EAR~~ are the foreign-produced direct product of U.S.-origin technology.

764 Supplement No. 1(b) - Option 2:

Standard text.

. . .

First, that (the denied person(s)) may not, directly or indirectly, participate in any way in any transaction involving any commodity, software or technology (hereinafter collectively referred to as "item") exported or to be exported from the United States that ~~is subject to the Export Administration Regulations (EAR)~~ requires a license or a License Exception, or in any ~~other activity subject to the EAR, including, but not limited to~~ of the following activities:

A. Applying for, obtaining, or using any license, or License Exception, or export control document related to a license;

B. . . . any transaction involving any item exported or to be exported from the United States that ~~is subject to the EAR~~ requires a license or a License Exception~~, or in any other activity subject to the EAR~~; or

C. Benefiting in any way from any transaction involving any item exported or to be exported from the United States that ~~is subject to the EAR~~ requires a license, or

a license exception ~~or in any other activity subject to the EAR~~.

Second, that no person may, directly or indirectly, do any of the following:

A. Export or reexport to or on behalf of the denied person any item ~~subject to the EAR~~ that requires a license;

B. . . . any item ~~subject to the EAR~~ that requires a license or a License Exception . . .

C. . . . any item ~~subject to the EAR~~ that requires a license or a License Exception . . .

D. . . . any item ~~subject to the EAR~~ that requires a license or a License Exception . . .

E. . . . any item ~~subject to the EAR~~ that requires a license or a License Exception . . .

. . . any item ~~subject to the EAR~~ that requires a license or a License Exception . . .

. . .

Fourth, that this order does not prohibit any export, reexport, or other transaction subject to the EAR where the only items involved ~~that are subject to the EAR~~ are the foreign-produced direct product of U.S.-origin technology.

764 Supplement No. 1 (b) - Option 3:

Standard text.

. . .

First, that (the denied person(s)) may not, directly or indirectly, participate in any way in any transaction involving any commodity, software or technology (hereinafter collectively referred to as "item") exported or to be exported from the United States that ~~is subject to the Export Administration Regulations (EAR)~~ requires a license, or in any ~~other activity subject to the EAR, including, but not limited to~~ of the following activities:

A. Applying for, obtaining, or using any license~~, License Exception,~~ or export control document related to a license;

B. . . . any transaction involving any item exported or to be exported from the United States that ~~is subject to the EAR~~ requires a license~~, or in any other activity subject to the EAR~~; or

C. Benefiting in any way from any transaction involving any item exported or to be exported from the United States that ~~is subject to the EAR~~ requires a license~~, or in any other activity subject to the EAR~~.

Second, that no person may, directly or indirectly, do any of the following:

A. Export or reexport to or on behalf of the denied person any item ~~subject to the EAR~~ that requires a license;

B. . . . any item ~~subject to the EAR~~ that requires a license . . .

C. . . . any item ~~subject to the EAR~~ that requires a license . . .

D. . . . any item ~~subject to the EAR~~ that requires a license . . .

E. . . . any item ~~subject to the EAR~~ that requires a license . . .

. . . any item ~~subject to the EAR~~ that requires a license . . .

. . .

Fourth, that this order does not prohibit any export, reexport, or other transaction subject to the EAR where the only items involved ~~that are subject to the EAR~~ are the foreign-produced direct product of U.S.-origin technology.

764 Supplement 2:

(a)(3) You are responsible for ensuring that you take no action ~~involving items subject to the Export Administration Regulations (EAR)~~ that is contrary to the terms of a denial order.

(b) Related persons. Some of the persons listed were not found to have violated the Act or Regulations but have been made subject to denial orders under 766.23. Related persons who are denied export privileges subsequent to ~~(the effective date of the interim EAR)~~ April 24, 1996, shall appear in part A of the Denied Persons List with a note . . .

766.6(b):

. . . each separate allegation ~~of~~ in the charging letter~~;~~. ~~i~~If the respondent is without knowledge, . . .

766.11:

(a) . . . information and documents that are ~~sensitive~~ classified from the standpoint of national security~~, foreign policy, business confidentiality, or investigative concern, and that~~ or are to be protected against disclosure for business confidentiality reasons. . . . undue disclosure of the ~~sensitive~~ classified or business confidential matter . . . prepare an unclassified ~~and nonsensitive~~ summary or extract. . . .

(b) . . . classified or ~~otherwise sensitive~~ business confidential . . . without compromising ~~sensitive~~ information which should not be disclosed. . . . access to ~~sensitive~~ classified or business confidential information and documents . . .

766.17(b)(2):

. . . or such other action as the judge deems ~~appropriate~~ reasonable. . . .

766.23(c):

. . . The sole issues to be raised and ruled on in any such appeal are whether the person so named is related to the respondent and whether the order is justified in order to prevent evasion, unless the naming of a related person results in grounds for reopening the case pursuant to 766.19. . . .

766.24(b)(2):

. . . consistent with national security classification~~, foreign policy,~~ and business confidentiality~~, and investigate~~ concerns.

766.24(b)(3):

. . . so long as there is sufficient reason to believe the likelihood of ~~a~~ an imminent violation.

766.24(d)(1):

. . . BXA's request shall be delivered to the respondent, or any agent the respondent may have designated for this purpose, . . .

766.24(e)(1)(ii):

The filing of an appeal shall stay neither the effectiveness of the temporary denial order nor any application for renewal,

nor will it operate to bar the Assistant Secretary's consideration of any renewal application, unless the conditions for reopening the case described in 766.19 are met.

766.24(e)(5):

. . . The Under Secretary's written order is final ~~and is not subject to~~ except for the possibility of judicial review, ~~except~~ as provided in paragraph (g) of this section.

768:

FOREIGN AVAILABILITY, INEFFECTIVE CONTROLS, AND COMPETITIVE DISADVANTAGE DETERMINATION PROCEDURES AND CRITERIA

768.1(a):

Authority. Pursuant to sections 3(2), 3(4), 3(10), 3(11), 5(f) ~~and~~, 5(h), 6(a)(6), 6(b)(1), and 6(h) of the Export Administration Act (EAA), . . .

768.1(b):

Scope. This part applies only to the extent that items are controlled for national security or foreign policy purposes.

768.1(c):

Types of programs. There are two general programs of foreign availability, a third program for ineffective controls, and a fourth program for competitive disadvantage. The two foreign availability programs are:

768.1(d):

. . .

Technical Advisory Committee (TAC). . . . on ~~export control matters related to specific areas of controlled items~~ technical matters, availability, licensing procedures, control list revisions, issuance of regulations, and other actions designed to carry out export control policy.

768.2(a):

Foreign availability.

(1) Foreign availability for items controlled for national security reasons exists when . . .

(2) Foreign availability for items controlled for foreign policy reasons exists when the Secretary affirmatively determines that a good or technology is available in sufficient quantity and comparable quality from sources outside the United States to countries subject to the export controls so that denial of an export license would be ineffective in achieving the purposes of the controls.

768.7(c) add:

The representations of applicants made in writing and supported by reasonable evidence shall be accepted, unless such representations are contradicted by reliable evidence.

768.7(f)(1)(i)(C):

~~(C) In the case of an item controlled multilaterally under the former COCOM regime, the U.S. Government will conduct any necessary consultations concerning the proposed decontrol or approval of the license with the former COCOM regime for a period of up to 4 months from the date of the publication of the determination in the Federal Register (the U.S. Government may remove the license requirement for exports to non controlled countries pending completion of the former COCOM regime review process); or~~

768.7(g) and (h):

(g) Foreign availability ~~to controlled countries~~ decontrol. When the Secretary determines that an item controlled for national security reasons is available to a controlled country and the President does not issue a National Security Override (NS)), BXA will ~~submit the determination to the Department of State, along with a draft proposal for the multilateral decontrol of the item or for the former COCOM regime approval of the license. The Department of State will submit the proposal or the license for former COCOM regime review. The former COCOM regime will have up to 4 months for review of the proposal.~~

~~(h) Foreign availability to non controlled countries. If the Secretary determines that foreign availability to non controlled countries exists, the Secretary will~~ decontrol the item for export to all non-controlled countries where it is found

to be available, or approve the license in question~~, unless the President exercises a National Security Override~~.

770.2(b)(2):

. . . only if the ~~appropriate~~ applicable entry for the part specifies that a license is required . . .

770.2(e)(2)(ii):

. . . under the Schedule B number ~~appropriate~~ for the individual item being exported.

770.2(g):

Interpretation 7: Scrap arms, ammunition, and implements of war. The following ~~A~~arms, ammunition, and implements of war, ~~as~~ even though they may be defined in the U.S. Munitions List, and ~~are~~ would otherwise be under the jurisdiction of the U.S. Department of State (22 CFR parts 120 through 130), ~~except for the following, which~~ are under the jurisdiction of the Department of Commerce:

. . .

(3) Other commodities that ~~may have been on the U.S. Munitions List are "scrap", and therefore under the jurisdiction of the Department of Commerce, if they~~ have been rendered useless beyond the possibility of restoration to their original ~~identify~~ identity . . .

770.2(h)(1)(ii)(B):

. . . designed for non-combat military purposes (transporting cargo, personnel and/or equipment and/or ~~for to wing~~ towing other vehicles and equipment over land and roads in close support of fighting vehicles and troops). . . .

770.2(k)(21) add:

Ethylphosphinyl dichloride

770.2(k)(22) add:

Ethylphosphinyl difluoride

770.2(l)(1):

. . .~~, or ECCN 4A002.e (equipment performing analog to digital conversions exceeding the limits in ECCN 3A001.a.5.a~~

770.3(b):

. . . ~~The only technology and software related to equipment exports that may be exported without a license is technology described in 734.7 through 734.11 of the EAR; operating technology and software described in 740.13(a) of the EAR; sales technology described in 740.13(b) of the EAR; and software updates described in 740.13(e) of the EAR.~~

770.3(c)(2):

. . . is subject to the EAR ~~is~~ in the same manner . . .

770.3(d)(1)(ii):

. . . disclosing it to the customer, unless one of the other license requirement exceptions described in 770.3(b) would apply.

770.3(d)(2):

(i) . . . Can we now proceed with this training at both locations under ~~a~~ License Exception OTS?

(ii) Answer 2. ~~A~~ Provided that . . .

~~(B) Any training beyond that covered under the provisions of License Exception for operating technology and software (OTS) described in 740.8(a), but specifically represented in your license application as required for this customer installation, and in fact authorized on the face of the license or a separate technology license, may not be undertaken while the license is suspended or revoked.~~

772 (see Appendix 4-1 for other needed changes in part 772 definitions)

"Electronic ~~A~~assembly." . . .

Australia Group. . . . dual-use chemicals~~, i.e.~~ weapons precursors~~,~~ and related equipment~~,~~ and biological microorganisms and related equipment~~,~~ in order to prevent the proliferation of chemical and biological weapons.

~~"Circulation" (controlled, anti-torque direction control systems)~~ "Circulation (controlled anti-torque direction control systems)." . . .

"Civil aviation authorities." (Cat 7 and 9) means the competent authority in Austria, Australia, Belgium, Canada, Denmark, Ireland, Finland, France, Germany, Greece, Italy, Japan, Luxembourg, Netherlands, Norway, Portugal, Spain, Sweden, Turkey, United Kingdom or United States of America.

Cooperating country. . . . and Switzerland. The governments of Argentina and Singapore are also considered to be cooperating for purposes of License Exception GOV'T.

Dual use. Items that have both ~~commercial~~ civil and military or proliferation applications. While this term is used informally to describe items that are ~~subject to the EAR~~ in the CCL or EAR99, ~~purely commercial items are also subject to the EAR (see 734.2(a) of the EAR)~~ some such items are purely civil and some dual use items are not in the CCL or EAR99, because their export is controlled by the Department of State or the Nuclear Regulatory Commission.

Foreign policy control. A control imposed under the EAR for any ~~and all~~ of the following reasons: . . .

License Exception. An authorization described in parts 740, 744, 746, or 754 . . .

"Missile propulsion components or equipment." (Cat 9) - The following propulsion components and equipment usable in "missiles":

— engines controlled by 9A101;

— lightweight, turbojet and turbofan engines (including turbocompound engines) designed or modified for use in "missilies";

— ramjet/scramjet/pulse jet/combined cycle engines, including devices to regulate combustion, and specially designed components therefor;

— rocket motor cases, 'interior lining', 'insulation' and nozzles therefor;

— staging mechanisms, separation mechanisms, and interstages therefor;

— liquid and slurry propellant control systems controlled by 9A106;

— hybrid rocket motors and specially designed components therefor.

'Interior lining' is suited for the bond interface between the solid propellant and the case or insulating liner. It is usually a liquid polymer based dispersion of refractory or insulating material, e.g., carbon filled HTPB or other polymer with added curing agents to be sprayed or screeded over a case interior.

'Insulation' is intended to be applied to the components of a rocket motor, i.e., the case, nozzle inlets, or case closures. It includes cured or semi-cured compounded rubber sheet stock containing an insulating or refractory material. It may also be incorporated as stress relief boots or flaps.

"Missile subsystems." Complete subsystems usable in "missiles", as follows:

a. Individual rocket stages;
b. Reentry vehicles, and equipment designed or modified therefor, as follows, except for those designed for non-weapon payloads:
    1. Heat shields and components thereof fabricated of ceramic or ablative materials;
    2. Heat sinks and components thereof fabricated of light-weight, high heat capacity materials;
    3. Electronic equipment specially designed for reentry vehicles;
c. Solid or liquid propellant rocket engines, having a total impulse capacity of 1.1×10^6 N-sec (2.5×10^5 lb-sec) or greater;
d. 'Guidance sets' capable of achieving system accuracy of 3.33 percent or less of the range (e.g., a 'CEP' of 10 km or less at a range of 300 km), except for those designed for missiles with a range under 300 km or manned aircraft;
e. Thrust vector control subsystems, except for those designed for rocket systems that do not exceed the range/capability of "missiles";
f. Weapon or warhead safing, arming, fuzing, and firing mechanisms, except for those designed for systems other than "missiles."

Note 1. Reserved

Note 2. 'CEP' (circle of equal probability) is a measure of accuracy; and defined as the radius of the circle centered at the target, at a specific range, in which 50 percent of the payloads impact.

Note 3. A 'guidance set' integrates the process of measuring and computing a vehicle's position and velocity (i.e., navigation) with that of computing and sending commands to the vehicle's flight control systems to correct the trajectory.

Note 4. Examples of methods of achieving thrust vector control which are covered by e. include:

a. Flexible nozzle;
b. Fluid or secondary gas injection;
c. Movable engine or nozzle;
d. Deflection of exhaust gas stream (jet vanes or probes); or
e. Use of thrust tabs.

"Most immediate ~~storage~~ memory." . . .

"Other rocket subsystems." (Cat 9) - Complete subsystems usable in "other rockets," as follows:

— individual rocket stages;
— solid or liquid propellant rocket engines having a total impulse capacity of 8.41×10^5 Ns (1.91×10^5 lb.s) or greater, but less than 1.1×10^6 Ns (2.5×10^5 lb.s).

"Other rockets." (Cat 9) - Complete rocket systems other than "missiles" (including ballistic missile systems, space launch vehicles and sounding rockets) and unmanned air vehicles (including cruise missile systems, target drones and reconnaissance drones) capable of a maximum range equal or superior to 300 km.

~~Positioning accuracy."~~ - delete in its entirety

Production facility. As defined by 10 CFR 110.2 of the Nuclear Regulatory Commission Regulations, production facility means any nuclear reactor or plant specially designed or used to produce special nuclear material through the irradiation of source material or special nuclear material, ~~the separation of isotopes or~~ the chemical reprocessing ~~or~~ of

irradiated source or special nuclear material, or the separation of isotopes, other than a uranium enrichment facility.

"Production facility." (MTCR context) (Cat 7 and 9) - Equipment and specially designed software therefor integrated into installations for "development" or for one or more phases of "production."

~~"Proof text."~~ - delete in its entirety.

"Radiation-hardened" (MTCR context) - The component or equipment is designed or rated to withstand radiation levels which meet or exceed a total irradiation dose of 5×10^5 rads (Si).

~~"Range." (Cat 8) - Half the maximum distance a submersible vehicle can cover.~~

"Real-time ~~P~~processing. . . .

"Required." . . . ~~extending~~ exceeding . . . If technologies "A", "B", "C", "D", and "E" are used together, a manufacturer can produce product "X" that does ~~not~~ operate at or above 400 MHz. . .

Return Without Action (RWA). An application may be RWA'd for one of the following reasons:

(a) The applicant has requested the application be returned
(b) A ~~License Exception applies~~ license is not required
(c) The ~~items are~~ transaction is not under ~~Department of Commerce~~ BXA jurisdiction
(d) ~~Required documentation has not been submitted with the application; or~~
~~(e)~~ The applicant cannot be reached after several attempts to request additional information necessary for processing of the application

~~"Telecommunication transmission equipment."~~ - delete in its entirety

Utilization facility. ~~(a)~~ As defined by 10 CFR 110.2 of the Nuclear Regulatory Commission Regulations, utilization facility means:
(1) aAny nuclear reactor, other than one that is a production facility~~,~~ and

(2) ~~a~~Any of the following major components of a nuclear reactor:

(i) Reactor ~~P~~pressure vessels (designed to contain the core of a nuclear reactor)~~, other than one that is a production facility, and the following major components of a nuclear reactor;~~

~~(1)~~ (ii) Reactor ~~P~~primary coolant pumps;

~~(2)~~ (iii) "On-line" reactor ~~F~~fuel charging ~~or~~ and discharging machines~~;~~ and

~~(3)~~ (iv) Complete reactor ~~C~~control rods system.

~~(b)~~ (3) Utilization facility does not include the steam turbine generator portion of a nuclear power plant.

774 Supplement No. 1:

a. For each ECCN, separate Reason for Control from License Requirements and delete all GBS, CIV, and TSR entries, as in the following examples, wherein the Column Numbers are as recommended for the Country Chart, i.e.:
   1. SS 1, CI 1
   2. NS 1, MT 1, CB 1, RS 1
   3. RS 2, CC 1
   4. NS 2
   5. NP 1
   6. CB 2
   7. NS 3, CC 2
   8. MT 2
   9. NP 2
   10. CB 3
   11. CW 1
   12. FC 1
   13. AT 1
   14. AT 2
   15. EM 1

1D001:

Reasons for Control:

NS applies to entire entry
MT applies to software for MT portion of 1B001
NP applies to software for NP portion of 1B001
AT applies to entire entry

License Requirements:	Country Chart Column
MT	2
Non MT	2 CIV and TSR

1E001: NS applies to entire entry:

Reason for Control:

NS applies to "technology" for 1A001.b, 1A001.c, 1A002, 1A003, 1B001 to 1B003, or 1C001 to 1C010;

MT applies to "technology" for the MT portions of 1A002, 1B001, 1C001, or 1C007 and to "technology" for all of 1A102, 1B101, 1B115, 1B116, 1C101, 1C107, or 1C115 to 1C117;

NP applies to "technology" for the NP portions of 1A002, 1B001, 1B101, 1C010, or 1C116 and to "technology" for all of 1A202, 1B201, 1B225 to 1B232, 1C202, 1C210, 1C216, 1C225 to 1C234, or 1C236 to 1C238;

CB applies to "technology" for 1C350 to 1C354;

AT applies to entire entry.

License Requirements:	Country Chart Column
MT, CB for 1C351-1C354, NP also NS	2
CB for 1C350	6
NP not also NS	5
NS for 1A002.a from 1C010.c,d	2 TSR only to no "x" in 4
NS Remainder	2 TSR

2A001:

Reason for Control:

NS applies to entire entry

AT applies to entire entry

License Requirements:	Country Chart Column
Entire entry	4

2B018:

Reason for Control:

NS applies to entire entry

MT applies to portions of 2B018 also described in 1B101, 1B115, 1B116, 2B104, 2B115, 2B116,

6B108, 7B102, 7B103, 9B105, 9B106, 9B115, 9B116, or 9B117;
RS applies to entire entry;
AT applies to entire entry.

License Requirements:	Country Chart Column
MT	2
Advisory Note	7 plus Rwanda and Serbia & Montenegro
Remainder	2

6A002:

Reason for Control:
NS applies to entire entry;
MT applies to portion of 6A002 also described in 6A102;
RS applies to 6A002.a.1, a.2, a.3, and c;
CC applies to police-model infrared viewers in 6A002.c;
AT applies to entire entry;
UN applies to 6A002.a.1, a.2, a.3, and c.

License Requirements:	Country Chart Column
MT and RS	2
CC	3
Remainder	4

b. Transfer all xx99x items to become EAR99 Notes for that Category, e.g., insert at the end of Category 1 EAR99:

Note: The following items require a license to Sudan and Syria for anti-terrorism reasons:
1C991 Vaccines containing items controlled by ECCNs 1C351, 1C352, 1C353, or 1C354;
1C992 Shaped charges specially designed for oil well operations, utilizing one charge functioning along a single axis, that upon detonation produce a hole, and have all of the following characteristics:
a. Contain any formulation of RDX, PYX, PETN, HNS, or HMX;
b. Have only a uniformly shaped conical liner with an included angle of 90 degrees or less;

c. Have a total explosive mass of no more than 90 grams; and
d. Have a diameter not exceeding three inches;

1C993 "Fibrous or filamentary materials", not controlled by 1C010 or 1C210, for use in "composite" structures and with a "specific modulus" of 3.18×10^6 m or greater and a "specific tensile strength" of 7.62×10^4 m or greater;
1C994 Fluorocarbon electronic cooling fluids made from at least 85% of any of the following:

(text from 1C994.a-c)

1C995 Mixtures containing precursor and intermediate chemicals used in the "production" of chemical warfare agents that are not controlled by ECCN 1C350;
1D993 "Software" specially designed for the "development", "production", or "use" of equipment or materials controlled by 1C210.b, 1C993, or 1C994;
1E994 "Technology" according to the General Technology Note for the "development", "production", or "use" of "fibrous or filamentary materials" controlled by 1C993 or fluorocarbon electronic cooling fluids controlled by 1C994.

Add a new 9A99x Pressurized aircraft breathing equipment not controlled by 9A018.d.

(For consistency with 742 Supplement 2 (c)(21))

c. Other changes in the CCL and justifications therefor are in Chapter 4 Appendices

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Chapter 7:
Commerce Anti-Boycott Restrictions

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CHAPTER 7

COMMERCE ANTI-BOYCOTT RESTRICTIONS

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7.1 INTRODUCTION

In the 1920s, in the British mandate of Palestine, Arabs began to boycott Jewish shops in an effort to secure for themselves a stronger place in the local economy. As Jewish immigration to Palestine increased throughout the 1930s, the local boycotts increased in number and scope. Support for the boycott outside Palestine, however, was virtually non-existent, since there was no pressure for such support and no political force existed to create it.

The end of World War II was a benchmark in many respects. In addition to the advent of nuclear technology and the demise of colonialism, the Arab world began its slow but steady emergence into the modern world's political structure. The Arab League was founded in 1945 by Egypt, Iraq, Jordan, Lebanon, Saudi Arabia, Syria, and Yemen, followed the next year by the organization of the Permanent Boycott Committee, functioning as an arm of the League's governing Council.[1]

Today, of course, the Arab League has assumed the status of a major political force, with a membership of many independent states and the Palestine Liberation Organization. Its boycott of Palestinian Zionists intensified after the founding of Israel in 1948, and the primary boycott or embargo of trade between Arab League members and Israel expanded to the "blacklisting" of third-country firms that traded with Israel, or that dealt with firms trading with Israel. It is this practice, which is known as "secondary boycotting" or "tertiary boycotting," that gave rise to the U.S. laws and regulations discussed in this chapter.

The Arab boycott of Israel became a major issue for United States exporters after the 1973-74 Arab oil embargo, which led to a tremendous transfer of wealth from the major Western industrial and commercial countries to the Arab oil producing states. With their

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[1] While Egypt remains a member of the Arab League, the 1980 Egyptian-Israeli peace treaty includes a renunciation of the boycott of Israel by Egypt. Fellow Arab League member Jordan likewise officially ended its economic boycott of Israel in 1995 pursuant to the Jordanian-Israeli Treaty of Peace. Treasury publishes in the Federal Register the current list of countries that may require participation in, or cooperation with, an international boycott (within the meaning of section 999(b)(3) of the Internal Revenue Code of 1986). The March 8, 1999, notice lists 11 countries: Bahrain, Iraq, Kuwait, Lebanon, Libya, Oman, Qatar, Saudi Arabia, Syria, United Arab Emirates, and Republic of Yemen.

newfound wealth the Arab states began to enforce their boycott of Israel, particularly the secondary and tertiary aspects of the boycott, with increased vigor.

In response to this invigorated Arab boycott of Israel, the United States Congress enacted *two* separate programs of anti-boycott regulation. First, as part of the Tax Reform Act of 1976, Congress amended the Internal Revenue Code to provide for the imposition of income tax penalties where a United States taxpayer or a member of the taxpayer's affiliated group, agrees, as a condition of doing business with or in a boycotting country, to participate in or cooperate with an international boycott.[2]

Second, as part of the Export Administration Amendments Act of 1977, Congress enacted comprehensive anti-boycott legislation, which was codified as section 8 of the Export Administration Act (EAA). As described in this chapter, section 8 prohibits "United States persons" from taking certain specified actions in connection with any transaction in "United States commerce" with intent to further or support the boycott. Section 8 is implemented by part 760 (renumbered in 1996 from former part 769) of the Export Administration Regulations (EAR).[3]

A detailed analysis of section 999 of the Internal Revenue Code is beyond the scope of this work, although its application to certain common Arab boycott requests and requirements is shown in Table 7-1.[4] Exporters should note, however, that the anti-boycott provisions of section 999 of the Internal Revenue Code are *inconsistent* with the anti-boycott provisions of section 8 of the EAA. Specifically, the two statutes are inconsistent as to their respective (i) jurisdictional scopes; (ii) substantive prohibitions; (iii) penalties; and (iv) reporting requirements. An effective program of anti-boycott compliance must be designed with reference to both of these programs of anti-boycott regulation.

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[2] These anti-boycott tax provisions are codified as section 999 of the Internal Revenue Code, and are discussed briefly at section 7.13 *infra*.

[3] The Bureau of Export Administration administers the EAA and enforces its anti-boycott provisions. Current regulations, press releases concerning enforcement activity, and information about the Office of Anti-Boycott Compliance can all be located on BXA' s website at http://www.bxa.doc.gov.

[4] For a detailed analysis, see Laura Carlson Chen, *Tax Aspects of International Boycotts*, 3 Int'l Boycotts (BLI) 2001.001 (1994).

To best understand the U.S. stance in relation to the Arab boycott, the nature of the boycott itself must be addressed. The so-called "primary boycott" was and is nothing more than an embargo of Israel by the Arab League members and is not relevant to this discussion. Many nations engage in embargoes in pursuit of their foreign policy and national security goals. Great Britain embargoed trade with Rhodesia following that nation's unilateral declaration of independence only to lift the embargo when Rhodesia became Zimbabwe. Indeed, U.S. export controls are, in fact, selective embargoes.

The "secondary boycott" was first applied by the Arab League against third country ships that carried Jewish immigrants or military cargo to Israel. Companies taking the brunt of this early expansion of the embargo were, for the most part, based in Cyprus; however, because of difficulties encountered in policing this boycott, the Arab League ultimately recommended that all firms making a "material contribution" to Israel be boycotted outright. Although secondary boycotts today are less troublesome in terms of applying U.S. law than are tertiary boycotts, the criterion of "material contribution" has become the linchpin for the application of all boycott measures.

The "tertiary boycott" is nothing more than the extension of the secondary boycott of the goods and services produced by blacklisted firms. Foreign firms not blacklisted are not allowed to use blacklisted goods and services. Thus, an Arab customer may purchase manufactured products from a non-blacklisted company only if that company agrees not to use components made by blacklisted or Israeli firms. Similarly, a foreign contractor may be prohibited from employing a blacklisted subcontractor on a project in an Arab state, even though the contractor is not blacklisted.

7.2 THE BLACKLISTING OF FIRMS

Firms are blacklisted if they are deemed to make a "material contribution" to Israel; and, while this criterion has always been murky (perhaps intentionally so), the past practice of the Arab League's Central Boycott Office (CBO) suggests that, at a minimum, the following acts would be seen as "material contributions" to Israel:

- Establishment of a branch, subsidiary, or other permanent establishment in Israel.

- Establishment in Israel of a "value-added" activity, such as an assembly plant operated by an independent Israeli company or the production in commercial quantities of goods containing Israeli-produced components.
- Use of a general agent or head office for the Middle East located in Israel.
- Licensing an Israeli company to use trademarks or patents of the foreign company.
- Creating a partnership or joint venture with an Israeli company.
- Entering into an agreement for the transfer of know-how or technical assistance to an Israeli company.
- Becoming a shareholder of an Israeli company.
- Exporting arms to Israel.
- Shipbuilding for Israel.
- Refusing to reply to questions aimed at discerning the company's position with reference to Israel or engaging in "Zionist activities."

There are exceptions to these rules where, euphemistically, it appears that "the higher interests of an Arab state" require that the boycott not be applied. Such exceptions have generally arisen in the arms trade, where firms supplying both sides with weapons have been omitted from the blacklist; in the tourist industry, where there are many hotel companies and airlines operating in both Arab nations and Israel; in the petroleum industry; in the insurance industry; and in the banking industry.

7.3 APPLICATION OF THE BOYCOTT

The boycott is applied in three ways. The primary boycott is enforced through the use of certificates of origin. In practice, there are two types of certificates: "negative" certificates (verifying that the goods in question are not produced in Israel), and "positive" certificates (verifying only that the goods are produced in a given country). Of the two, the Arab League does not require the former, and the latter is accepted routinely by Arab countries.

The second method, by which secondary and tertiary boycotts are enforced, is blacklisting. The process by which a firm is blacklisted comprises commercial intelligence and verification. In most instances, the firm being considered for blacklisting is unaware that

its operations are being scrutinized; only when a preliminary determination has been made that the firm's activities are making a "material contribution" to Israel, will the process come to light. At that time, the CBO will inform the firm of its "offense" and request the firm to complete and return a questionnaire to verify the information. The failure of firms to respond often leads to blacklisting.

The third method may apply when a foreign firm seeks to establish a branch or subsidiary, register a trademark, or appoint a commercial agent (*i.e.*, a distributor or sales representative) in an Arab state. That firm may be asked to "clarify" its relationships with Israel. In such circumstances, the foreign firm may be asked to respond to a questionnaire on whether it is making or has made such a "material contribution" to Israel, along the lines described above. Failure to respond to the questionnaire generally leads to the foreign firm being put on the blacklist.

7.4 THE PURPOSE OF ANTI-BOYCOTT RESTRICTIONS

The fundamental purpose of the anti-boycott restrictions is to prevent U.S. persons from refusing to do business with another person because of "boycott reasons." "Boycott reasons" include a multitude of sins, ranging from a direct agreement by a U.S. person with the boycotting country to cooperate with the boycott to a failure to accept a financial or commercial opportunity in order to avoid being placed on the blacklist.

The law is designed to ensure that no person within its reach furthers the purposes of a boycott against a country friendly to the United States.

Although the law was enacted in response to the Arab boycott of Israel, it is also applicable to boycott requirements occasionally imposed between Taiwan and the People's Republic of China, or between India and Pakistan, or to any other boycott imposed against a nation with which the United States is friendly.

Understanding the anti-boycott law requires an understanding of the extent of its reach, in terms of persons, in terms of business transactions, and in terms of conduct. If the circumstances of a transaction are outside the reach of the law in any one of these categories, the law does not apply. Thus, even if the persons involved and the conduct involved falls within the law, the transaction may not and the law will not apply. It should be emphasized, however, that section

999 of the Internal Revenue Code may apply to boycott-related actions of foreign affiliates of United States taxpayers, even if such actions have no other connection with the United States.

7.5 PERSONS SUBJECT TO ANTI-BOYCOTT RESTRICTIONS

When Congress enacted the anti-boycott amendments to the EAA in 1977, it sought to reach as many persons and business activities as it could without overreaching U.S. jurisdiction.

Section 8 of the Act directs the President "... to issue regulations prohibiting any United States person, with respect to his activities in the interstate or foreign commerce of the United States, from taking or knowingly agreeing to take ..."specified actions in support of foreign boycott activity. Accordingly, 15 C.F.R. § 760 focuses first on the definition of a "United States person."

7.5.1 Definition of "United States Person"

U.S. citizens and business entities (whether proprietorships, partnerships, or corporations) organized under the laws of the United States or any of its states, are U.S. persons.[5] But U.S. citizens who reside outside of the United States and who are either employed by a non-U.S. person or assigned to work as an employee for, and under the control of, a non-U.S. person are not U.S. persons. This exception was made in order to avoid placing the expatriate American employed by, or under the control of, a foreign company in an untenable position.

Conversely, the U.S. branches or subsidiaries of foreign companies, as well as foreign nationals resident in the United States, are U.S. persons for the purposes of the Act. In fact, any "permanent establishment" of a foreign national in the United States is considered a U.S. person. While the examples of "permanent establishment" set forth in the regulations are easily understood, the term has a far broader application and understanding than what is suggested in the regulations. It may be clear, for example, that the U.S. branch or subsidiary of a foreign corporation is a permanent establishment of that foreign corporation. What about a showroom set up by a foreign corporation in New York to exhibit its products? More importantly,

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[5] 15 C.F.R. § 760.l(b).

what about a U.S. purchasing office for a foreign company? The answers to these questions may be found by reference to U.S. tax treaties rather than in the EAR and, in fact, may conflict with the clear purposes of the anti-boycott law.[6]

The United States generally has adopted the standards of the Organization for Economic Cooperation and Development (OECD) in relation to its bilateral tax treaties. These tax treaties provide that each country will levy income taxes only on the earnings attributable to the permanent establishments of companies from the other country. Accordingly, permanent establishments usually only encompass income-producing activities, such as sales offices, factories, and the like. Purchasing activities almost invariably are expressly excluded from those activities deemed to be linked to permanent establishments. But it is clear that purchasing offices of foreign concerns would be among those most likely to run afoul of U.S. anti-boycott laws, and the Commerce Department has conducted anti-boycott enforcement proceedings against the U.S. purchasing office of at least one Saudi firm.

In sum, the anti-boycott law basically covers the following classes of persons:

- U.S. citizens and residents (non-expatriates).
- Domestic U.S. concerns (including U.S. permanent establishments of foreign concerns).
- Foreign operations of domestic concerns "controlled-in-fact" by those domestic concerns.[7]

The law also applies to the U.S. Government and any state government or subdivision. The term "person" is given as broad an application as possible, so that even trade associations, charitable or fraternal organizations, and labor unions are specifically covered.

7.5.2 Foreign Subsidiaries

Anti-boycott restrictions generally cannot be avoided by establishing a foreign subsidiary. The anti-boycott laws apply equally to

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[6] See, for example, Article II of the U.S.-German Tax Treaty, which expressly excludes as "permanent establishments," storage or display facilities and the maintenance of a fixed place of business for the purpose of purchasing goods or purchasing merchandise or collecting information for a German company.

[7] 15 C.F.R. § 760.1(c).

U.S.-based business organizations, permanent establishments in the United States of foreign business organizations, and foreign-based operations "controlled-in-fact" by U.S. firms or the U.S. permanent establishments of foreign concerns.

Whether a foreign-based operation is "controlled-in-fact" will depend upon the nature and extent to which its general policies or day-to-day operations either are in fact controlled or are capable of being controlled by a domestic concern.[8] Therefore, a U.S. company cannot avoid the anti-boycott laws by exporting products or services to a wholly-owned foreign subsidiary which, in turn, reexports to an Arab customer in compliance with Arab boycott rules.

7.5.3 Definition of "Controlled-In-Fact"

To streamline the regulations, certain legal structures are presumed to create "controlled-in-fact" situations.[9] These presumptions can be overcome only by presenting competent evidence that the control does not exist. They include the following situations:

- The domestic company beneficially owns or controls, directly or indirectly, more than 50 percent of the outstanding voting stock of the foreign operation. Thus, if a U.S. concern only holds the stock as a trustee and has no ability to manage the foreign concern, the element of beneficial ownership would not be present. However, if the domestic concern establishes one or more intermediate firms owning or controlling the foreign operation, the presumption would still apply. Also, if three U.S. companies each owned 20 percent of the foreign operation (and regularly cast their votes in concert), the foreign company would be presumed to be "controlled-in-fact" by a domestic concern.
- The domestic company beneficially owns or controls, directly or indirectly, 25 percent or more of the outstanding voting stock of the foreign operation, where no other person owns or controls, directly or indirectly, an equal or larger percentage. This presumption recognizes that control can be achieved through a minority ownership where the majority ownership is dispersed.

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[8] 15 C.F.R. § 760.1(c).

[9] 15 C.F.R. § 760.1(c)(2).

- The foreign operation is managed by the domestic concern pursuant to an exclusive management contract. Thus, even if the voting stock of the foreign company were held entirely by non-U.S. persons, that foreign company would still be considered a U.S. person under the anti-boycott law if it were managed by a U.S. company.
- A majority of the members of the governing board of the foreign company are also members of the comparable governing board of the domestic company.
- The domestic company has authority to appoint the majority of the members of the governing board of the foreign company.
- Finally, the domestic company has authority to appoint the chief operating officer of the foreign company.

7.5.4 Shareholder Accountability

An individual U.S. citizen or resident affiliated with a foreign company is not invariably responsible if the company violates U.S. anti-boycott restrictions. If an individual participates directly in boycott-related activities, he violates U.S. law. Similarly, if a foreign company which is controlled-in-fact by a U.S. company participates in boycott-related activities, the U.S. company is culpable.

However, a U.S. person who owns shares of either a U.S. company or a foreign corporation is not considered to be a "domestic concern" under the Regulations; therefore, the foreign subsidiary is not considered to be "controlled-in-fact."[10] As a practical matter, the result of such a situation is that the individual would not be held personally responsible if either the U.S. company or the foreign concern broke the anti-boycott laws, unless it could be shown that that person, individually or in concert with others, undertook some unlawful activity. It also means that the foreign company in this case could not be held accountable for its conduct in relation to the anti-boycott laws. Lest anyone derive any false comfort here, it should be noted that the anti-boycott prohibitions extend to all U.S. persons, and simply because a foreign concern cannot be held accountable for breaking those laws, it does not mean that a U.S. person who causes that foreign company to behave in that manner is beyond the reach of the law. Indeed, the use of a foreign corporation by a U.S.

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[10] See example (xi) under 15 C.F.R. § 760.1(c)(5).

person or firm to comply with boycott requirements is specifically prohibited by the *evasion* provisions of the law.

7.6 ACTIVITIES SUBJECT TO ANTI-BOYCOTT RESTRICTIONS

Not all boycott-related activities are subject to anti-boycott restrictions. Such activities are restricted only if they come within the purview of the interstate or foreign commerce of the United States. Aside from the obvious cases directly involving foreign trade of goods and/or services from and to the United States, it is difficult to determine whether a given transaction is or can be defined as "the interstate or foreign commerce of the United States." This is particularly true in the cases of controlled-in-fact foreign affiliates of U.S. and offshore entities or transactions.

Not all activities of "controlled-in-fact" foreign subsidiaries and affiliates fall within the constitutionally permissible reach of U.S. commerce. They clearly do so when there is a transaction between the foreign affiliate and a person located in the United States. However, where the transaction occurs between the foreign affiliate and another person located outside the United States, the general rule is that the transaction is an activity within U.S. interstate or foreign commerce only if the foreign affiliate acquired the goods or services from a U.S. person for the *purpose* of meeting his obligations as the supplier in the transaction.[11]

This so-called "purpose" test is applied broadly. The goods or services can be acquired specifically in response to an order, or they can be acquired for incorporation into a value-added operation producing goods for the ultimate buyer. They also can be acquired in anticipation of such an order, to build inventory, for example. It is not necessary that the goods ordered by the ultimate buyer be exclusively supplied by a person in the United States, so long as part of the transaction involves goods or services from the United States.

The only instance in which U.S.-source goods involved in a transaction between a foreign affiliate of a U.S. concern and a third person will not be considered to be in U.S. commerce is where the U.S. goods have been purchased without reference to a specific deal with the third person and are incorporated into another product.

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[11] 15 C.F.R. § 760.1(d).

Similarly, the only instance in which the sale of U.S.-source services will not be considered as being in U.S. commerce is where such services have been acquired without reference to a specific order or transaction with the third person and are provided to the foreign affiliate for its own use, rather than for the use of the third person.

7.7 THE EFFECT OF ANTI-BOYCOTT RESTRICTIONS ON FINANCIAL TRANSACTIONS

The anti-boycott laws are directed specifically to prevent letters of credit from being used as instruments of boycott.[12] Accordingly, the implementation of a letter of credit in the United States by a U.S. person is considered as being an activity in U.S. commerce and the implementation of a letter of credit outside the United States by a U.S. person is also considered as being an activity in U.S. commerce where the letter of credit specifies a U.S. address for the beneficiary, calls for documents indicating shipment from the United States, or calls for documents indicating that the goods are of U.S. origin.[13]

However, the provision of project financing by a U.S. bank to the foreign affiliate of a U.S. concern does not bring the underlying transaction within U.S. commerce where that transaction otherwise would not be within U.S. commerce. The practical effect of this rule is that the U.S. bank cannot comply with boycott requests in providing the financing, but that the borrower (which is a U.S. person) could comply with its customer's boycott requests if the transaction between the foreign affiliate and the customer does not come within the framework of U.S. commerce. For example, a U.S. bank could provide financing to the foreign affiliate where the goods or services provided to the customer of the foreign affiliate were from a source other than the United States.

7.8 PROHIBITED CONDUCT

There are six types of conduct that are prohibited: (1) refusals to do business with a boycotted country or person; (2) taking discriminatory actions against any U.S. person based on race, religion, sex, or national origin; (3) furnishing information about race, religion, sex, or national origin; (4) furnishing

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[12] 15 C.F.R. § 760.2(f).

[13] 15 C.F.R. §§ 760.1(d)(18, 19) and 760.2(f).

information about business relationships with boycotted countries or blacklisted persons; (5) furnishing information about associations with charitable and fraternal organizations; and (6) implementing letters of credit containing prohibited conditions and requirements. It should be noted that these prohibitions apply to actions taken in response to boycott requests or requirements. Discrimination in employment of women within an Arab country in response to Arab traditions or customs would *not* constitute a violation of the anti-boycott regulations, although it might violate equal employment laws.

There is no meaningful distinction between transmitting and furnishing information. Restrictions apply whether or not the transmitter is the author. However, the facts relating to third party involvement may be important, *e.g.*, standard practice to pass on, without examination, documents prepared by another party.[14]

7.8.1 Refusal to Do Business

The Act and the regulations take clear aim at all behavior, however disguised, which constitutes a conscious effort to comply with or acquiesce in an impermissible boycott, that is, any action which excludes a person or country from a transaction for boycott reasons when that boycott is not sanctioned by the United States.[15] The most notable of the types of prohibited conduct covered by the EAA is the culpable refusal to deal.

Generally speaking, no U.S. person may refuse, knowingly agree to refuse, or require any other person to refuse to do business with any person when such refusal is under an agreement with, a requirement of, or a request from a boycotting country. The EAR emphasizes that culpable refusals to deal need not be those taken under contracts or ones arising in specific instances, but may include a course of conduct from which such refusals to deal may be inferred. Thus, for example, the use of a "whitelist" — that is, a compilation of firms with whom a company will deal — may be just as culpable as the use of the "blacklist." Similarly, the mere declination of a financial or commercial opportunity for boycott reasons may be culpable.

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[14] 15 C.F.R. part 760 Supplement 15.

[15] 15 C.F.R. § 760.2.

The illustrative examples cited in the EAR highlight those factual situations in which refusals to do business are culpable:

- Where a U.S. manufacturer, receiving an order from a boycotting country, fails to solicit bids from certain potential subcontractors because it knows that those subcontractors are blacklisted.
- Where a U.S. exporter, which customarily ensures its shipments with a particular company, departs from that practice in order not to run afoul of its boycotting country customer's blacklist of that insurance company.
- Where a U.S. exporter, doing business with another U.S. company that, in turn, does business in a boycotted country, switches its trade to another company in anticipation of receiving a request to sever its relations with the former.
- Where a U.S. company abandons its plans to open a branch in a boycotted country in order to keep its branch in a boycotting country.

The EAR also furnishes examples of those instances where a refusal to do business is not culpable.[16] Thus, where an invitation to a U.S. company to bid on a contract with a boycotting country includes, as a specification, that the subcontractor must maintain a supply of spare parts and a service facility in the boycotting country, the contractor is not guilty of a refusal to deal even though the effect of the specification is to exclude as bidders blacklisted companies. Of course, the specification must be based solely on commercial necessity, and not on boycott-related reasons.

Other examples contained in the EAR point out that, if such a specification is motivated in the slightest by boycott reasons, the company has engaged in an unlawful refusal to do business. Irrespective of the difficulties inherent in dealing with such distinctions, each U.S. company must document, as a matter of course, all such decisions in order to avert possible prosecution.

7.8.2 Discriminatory Actions

The second category of prohibited conduct is discriminatory actions. In this group are the proscriptions against the refusals by a U.S. person to deal with any other U.S. person on the basis of race,

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[16] See examples following 15 C.F.R. § 760.2(a)(10).

religion, gender, or national origin. The EAR expands this basic tenet to situations involving discrimination against U.S. corporations on the basis of nationality, race, religion, or gender of any of its officers, directors, or employees, whether any such actions comprise direct conduct, or an agreement to take such actions, or requiring others to take such actions. To avoid confusing these rules with other civil rights rules, the EAR provides that these rules apply only to the activities of U.S. persons in interstate or foreign commerce and only when such conduct is undertaken with an intent to comply with, further, or support an unsanctioned foreign boycott; furthermore, the preemption of any other anti-discrimination statutes is expressly disclaimed.

The clear thrust of this part of the EAR is to prevent a U.S. person from contracting with a boycotting country to refuse to employ certain persons because of the boycotting country's probable refusal to allow entry of such persons. However, the examples cited in the EAR illustrate the fact that these rules do not apply where persons are excluded on the basis of citizenship, nationality, or residency.[17] Also illustrated is the notion that a prohibition against the employment of women, not boycott-based and therefore outside of the EAR, nonetheless violates U.S. civil rights laws.

A 1997 boycott-related religious discrimination enforcement action illustrates that not even government agencies have impunity to violate the anti-boycott prohibitions.[18] The case involved "screening processes" used by the U.S. Department of Justice and the U.S. Air Force to exclude Jewish persons from working on a litigation support project in Saudi Arabia. An operations plan for the project included the following employee screening requirement: "No Jews or Jewish surnamed personnel will be sent as part of the document Acquisition Team because of the cultural differences between Moslems and Jews in the Region.... No Israeli stamped passport, as per Saudi rules." Interestingly, there was no evidence that the restriction was specifically requested by, required by, nor even known to the Saudi Arabian government. At least one U.S. person was actually denied a

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[17] Section 999 of the Internal Revenue Code *does* provide for the imposition of anti-boycott penalties where a United States taxpayer discriminates on the basis of nationality in response to a boycott requirement. I.R.C. § 999(b)(3)(iv).

[18] Department of Commerce News Release BXA-97-05 (regarding settlement with U.S. Justice Department, U.S. Air Force, *et al.*).

place on the team due to his religion. The agencies involved promised to "institute measures to prevent a similar event from happening again."[19]

7.8.3 Furnishing Personal Information

Not only is it illegal to discriminate against U.S. persons on account of religion, race, gender, or national origin for boycott-related reasons, it is also illegal simply to furnish information about any U.S. person's race, religion, gender, or national origin under those circumstances.[20] This prohibition applies to persons employed by U.S. companies, too. It applies solely with regard to the U.S. person's activities in interstate or foreign commerce; however, as in the case of actual discrimination discussed above, conduct not covered by this law may be prohibited by state or federal civil rights statutes.

Furnishing information may assume several forms, including stating the place of birth or nationality of a person's parents or the use of code words or symbols identifying a person's race, religion, gender, or national origin and is prohibited whether specifically requested by the boycotting country or furnished voluntarily by a U.S. person. Accordingly, if a U.S. company receives a questionnaire requesting information of this sort and the company knows, or has reason to know, that the information is sought for boycotting purposes, it may not answer the questionnaire.[21] Nor may a U.S. company certify to a boycotting country that its board of directors includes any persons of a particular national origin.

A U.S. firm should exercise extreme caution in transmitting information in connection with visa applications for employees that will be sent to a boycotting country. Visa applications for a number of Arab countries, such as Saudi Arabia, require information as to the applicant's religion. A U.S. firm may *not* provide information as to any person's religion in response to a boycott request. The U.S. firm may, however, receive and transmit visa application forms for its employees, provided that that company is performing only a ministerial function, even if it suspects that the boycotting country

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[19] *Id.*

[20] 15 C.F.R. § 760.2(c).

[21] See example (iii) following 15 C.F.R. § 760.2(c)(4).

will not grant visas to employees of a particular religion or national origin.

7.8.4 Business Relationships with Boycotted Countries or Blacklisted Persons

This part of the law is an extension of the prohibitions contained in the two previous sections to circumstances where a U.S. person is asked to furnish information regarding past, present, or proposed business relationships with or in a boycotted country. This information can include business organizations, nationals, or relationships with any other person who is known or believed to be blacklisted by a boycotting country.

While the EAR expressly excludes the provision of normal business information to boycotting countries as a violation, they point out that no information about business relationships with blacklisted persons or boycotted countries may be furnished in response to a boycott request, even if publicly available. Requests for any such information from a boycott office are presumed to be boycott-based.

The distinctions arising from factual situations in this context are fine ones indeed. For example, a U.S. company may submit a copy of its annual report with its bid to the contracting authority in a boycotting country, even though the annual report necessarily discloses whether the company has a business relationship with a boycotted country. But if the annual report is to be furnished to the boycotting country's boycott office, the U.S. company may not submit it even though it is publicly available.[22] Similarly, a U.S. company cannot certify to a boycotting country that it has no facilities in a boycotted country but it may submit reports regarding other past projects to the boycotting country (assuming such are relevant to the proposed transaction with the boycotting country) because that would be "normal business information" even if it necessarily disclosed the presence or absence of a prior business relationship with a boycotted country. The EAR justifies the distinction on the basis that, in the latter instance, the U.S. company would not have reason to know that the request for information was boycott-related.

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[22] See example (viii) following 15 C.F.R. § 760.2(d)(5).

Because of these fine lines and the draconian consequences[23] attending a failure to stay on the right side of them, certain guidelines should be followed. First, if a U.S. company wants its overseas activities to be a matter of public, commercial knowledge, it should ensure that all of its brochures and other publicity material describe such activities in a commercially meaningful manner and are generously distributed. Second, no U.S. person should give much credence to the EAR's standard of knowledge (either actual or constructive) in relation to the issue of whether a given request is boycott-related. Obviously, no request from a boycott office can be answered without great risk. Any request from a boycotting country (or an enterprise thereof) for information which is not commercial in its most fundamental form must be regarded with the utmost suspicion. Certainly, to the extent that a company's overseas experience and activities are described in its brochures, the more freedom it will have in responding to a request for business information from a boycotting country.

7.8.5 Associations with Charitable and Fraternal Organizations

Another variation on the furnishing information theme covers responses to requests from boycotting countries concerning the associations of U.S. persons with, or in support of, charitable or fraternal organizations, which, in turn, support a boycotted country.[24] Here U.S. law is endeavoring to short-stop any compliance with an unsanctioned foreign boycott that attempts to ferret out information concerning affiliations of U.S. persons with such groups as B'nai B'rith or United Jewish Welfare Fund. The prohibition again finds exception in terms of providing normal business information, although it is difficult to envision a situation in which such information would be relevant to any commercial transaction.

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[23] Two of the largest settlements in the history of the anti-boycott program arose mainly from violations of this category of furnishing information. In each case, a company was trying to remove itself from the Arab blacklist by detailing its business relationships with or in Israel. Anti-boycott enforcement in this area seems to be particularly strict, as the Office of Anti-Boycott Compliance applied a parsing policy to generate as many offenses as possible. See 58 Fed. Reg. 16,813, regarding Baxter International, Inc. (March 31, 1993); and Department of Commerce Press Release BXA-95-45, regarding the consent agreement of Parbel of Florida *et al.*

[24] 15 C.F.R. § 760.2(e).

7.8.6 Letters of Credit

The final classification of acts considered illegal under the anti-boycott laws concerns the implementation of letters of credit containing a condition or requirement compliance with which by a U.S. person is prohibited by the anti-boycott law and regulations.[25] Generally, these rules apply solely to banks, as the definition of "implementation" extends only to banking functions. For the purposes of the law and the EAR, "implementation" is equated with the following:[26]

- Issuing or opening a letter of credit.
- Honoring by acceptance any letter of credit.
- Paying a draft or other demand by the beneficiary of a letter of credit.
- Confirming a letter of credit.
- Negotiating a letter of credit.
- Taking any other action (except for advising or other ministerial activities) to implement a letter of credit.

In contrast, the concept of "implementing" a letter of credit does *not* include advising the beneficiary of that letter of credit.

The EAR applies to letters of credit implemented both inside and outside the United States, so long as the transaction to which the letter of credit applies is in U.S. commerce and the beneficiary is a U.S. person. Where a letter of credit is implemented in the United States, it is presumed to apply to a transaction in U.S. commerce; furthermore, it is presumed to be in favor of a U.S. person if the letter of credit specifies a U.S. address for the beneficiary. This presumption also pertains to the implementation of a letter of credit outside of the United States, if that letter of credit requires documents indicating that the goods have been shipped from the U.S. or are of U.S.-origin.[27]

On the other hand, in each case, the indication of the beneficiary's address as being outside of the U.S., whether the letter of credit is to be implemented inside or outside of the U.S., creates

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[25] 15 C.F.R. § 760.2(f).
[26] 15 C.F.R. § 760.2(f)(2).
[27] 15 C.F.R. § 760.2(f)(9).

the presumption that the beneficiary is other than a U.S. person. Similarly, where the letter of credit does not require documents indicating U.S.-origin goods or shipment from the United States, the presumption is that the transaction underlying the letter of credit is outside of U.S. commerce.

It is important to note that each of the presumptions described above are rebuttable. Even where the transaction appears to fall outside of the reach of this part of the anti-boycott laws, a U.S. bank could still be found in violation of the law if there are facts which reasonably could lead the bank to conclude that the transaction was in U.S. commerce or that the beneficiary is a U.S. person. Unfortunately, none of the examples given in the EAR specifies the kinds of facts which could be cited in rebutting the presumptions mentioned above.

Finally, it is also important to note that, in addition to prohibiting the implementation of letters of credit containing impermissible boycott conditions, the anti-boycott law also provides that no U.S. person shall be obligated to pay, honor, or otherwise implement such a letter of credit. The EAR is specific in this regard:[28]

> Compliance with this section shall provide an absolute defense in any action brought to compel payment of, honoring of, or other implementation of a letter of credit, or for damages resulting from failure to pay or otherwise honor or implement the letter of credit. This section shall not otherwise relieve any person from any obligations or other liabilities he may incur under other laws or regulations, except as may be explicitly provided in this section.

For example, the EAR describes a situation in which a U.S. bank inadvertently confirms a letter of credit in favor of a U.S. exporter that contains a prohibited boycott condition. The exporter later sues the bank when it refuses to honor the exporter's draft. The EAR states that the bank has an absolute defense to the action, but notes that this section does not alter any other obligations or liabilities of the parties under appropriate law. Does that mean that the exporter may recover its loss from the bank on a common law theory of negligence? Although difficult perhaps to accomplish, this possibility would appear to be envisaged.

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[28] 15 C.F.R. § 760.2(f)(5).

Banks should keep in mind that they can easily run afoul of the anti-boycott requirements when dealing with letters of credit, even when not violating the letter of credit prohibitions themselves. Consider the dilemma of Banca Nazionale del Lavoro (BNL), a U.S. person.[29] BNL confirmed a letter of credit for a transaction involving a non-U.S. buyer, a non-U.S. seller, and non-U.S. goods. Therefore, the letter of credit itself was outside U.S. commerce. However, the non-U.S. beneficiary supplied BNL with a negative certificate of origin, which BNL was supposed to forward to the issuing Central Bank of Iraq for reimbursement. When BNL discovered the violating statements, it refused to forward the documents and argued that it was not obligated to pay. BNL lost its case to the beneficiary in Georgia State court[30] and was subsequently charged with forwarding documents containing boycott terms while trying to obtain reimbursement.

7.9 INTENT REQUIREMENT

Only intentional violations of the anti-boycott prohibitions are culpable.[31] While it is not possible here to explore all of the legal tests of intent, certain generalizations are useful:

- Any boycott-related action must be taken with the intent to comply with an unsanctioned foreign boycott; an inadvertent compliance is not culpable.
- Knowing compliance with the request is culpable, even if the person does not agree with the boycott.[32]
- Compliance with a boycott request can be culpable, even if there may be legitimate business reasons for taking the action. Thus, for example, if a U.S. company decides not to do business with

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[29] See BXA Case No. 91-76 under violations at http://www.bxa.doc.gov/FOIA/Foialib.htm.

[30] Banca Nazionale del Lavoro v. SMS Hasenclever, GmbH, 439 S.E.2d 502 (Ga. App. 1993), *cert. denied*, 65 U.S.L.W. 3267 (Oct. 4, 1994) (No. 93-2006).

[31] The language of the statute and of 15 C.F.R. § 760.1(e) speaks in terms of any U.S. person taking or knowingly agreeing to take certain actions with the intent to comply with, further, or support an unsanctioned foreign boycott.

[32] See United States v. Meyer, 864 F.2d 214 (1st Cir. 1988) and discussion at section 7.9.2.3 *infra.*

a boycotted country or blacklisted firm both for sound business reasons and because it wants to preserve its business relations with a boycotting country, that action would be culpable.

The examples provided in 15 C.F.R. 760 of the regulations are helpful, but they are intended to be illustrative only and are not comprehensive. In practice, few actual cases resemble these examples. Accordingly, any U.S. firm is well-advised to document thoroughly the disposition of all boycott-related business matters.

Minutes of board or executive committee meetings offer an excellent opportunity for a company to negate culpable intent. These minutes might appear as follows:

> The Chairman reported to the meeting that the company had been studying the feasibility of opening an assembly plant in Israel, in addition to its existing plant in Syria. The Chairman presented to the meeting a feasibility study conducted by the Marketing Department of the company, a summary of which is attached to these minutes as Exhibit A. The Chairman commented that in view of the fact that the probable market for the company's products was not sufficiently large in the foreseeable future to generate a return on investment of at least 15 percent, he moved that any further consideration of the new facility be deferred. The motion was seconded. In discussing the motion, Mr. Jones asked whether the Chairman had been requested by the Syrian authorities not to establish a plant in Israel. The Chairman replied that as far as he was aware, the Syrian authorities were unaware that the company was even considering establishing a plant in Israel, but that even if such a request were made, it would not comprise any part of a decision relative to the Israeli project. The Chairman further observed that the feasibility of establishing a plant in Israel would not be affected by being blacklisted by the Syrian government, as the vast majority of the customers for these products are located in countries outside of the Arab League and could be served as readily from Israel as from Syria. There being no further discussion, the question was called for, and the motion carried unanimously.

Minutes such as these accomplish two purposes. First, if prepared at or about the time the matter is discussed, they are much more accurate than a memorandum or other record which might have to be generated at a later date under the heat of an investigation.

Second, such minutes are also admissible as evidence in any administrative or judicial proceeding and are far more convincing than mere oral testimony. This is particularly true if the company routinely maintains comprehensive minutes of its board and executive committee meetings. Obviously, if the only minutes in the notebook are those concerned with meetings at which boycott-related problems are aired, they could be regarded with some suspicion.

7.10 EXCEPTIONS TO PROHIBITIONS

There are six basic exceptions to the prohibitions set forth in 15 C.F.R. § 760.3: (1) where a U.S. person must comply with the import requirements of a boycotting country (including the shipment of goods to that country); (2) where a U.S. person must comply with import and shipping document requirements of a boycotting country; (3) where a U.S. person must comply with the unilateral and specific selection practices; (4) where a U.S. person must comply with a boycotting country's requirements regarding shipment and transshipment of exports to that country; (5) where a U.S. person must comply with immigration, passport, visa, or employment requirements of a boycotting country; and (6) where a U.S. person otherwise must comply with the local law of a boycotting country.

7.10.1 Import Requirements

In contrast to an across-the-board refusal to do business with a boycotted country, which a U.S. person cannot lawfully do, a U.S. person may comply or agree to comply with the law of a boycotting country prohibiting the importation of goods from a particular boycotted country. Thus, if a U.S. supplier receives an order from a boycotting country for certain machinery, and the order specifically provides that the machinery may not include components from a boycotted country, the U.S. supplier lawfully may comply with that condition in filling the order. However, if the order specified that none of the components could be produced by any firm owned by nationals of the boycotted country, irrespective of where organized, the U.S. supplier could not comply, since to do so would be extending the boycott to countries other than the boycotted country. But a U.S. supplier or shipper may comply, or agree to comply, with its boycotting customer's requirements that

forbid the shipment of the consignment via carriers of the boycotted country or via routing other than that prescribed by the boycotting country or the customer.

7.10.2 Import and Shipping Document Requirements

It would seem obvious that if a U.S. supplier could lawfully agree to comply with certain import and transportation restrictions imposed by a boycotting country, there can be no difficulty in complying with any documentary practices supporting those prohibitions. However, all such required information must be stated in positive, non-blacklisting, non-exclusionary terms, except in regard to the names of carriers and routes of shipment, which may be stated in negative terms.

Thus, a United States exporter may agree that it will not supply Israeli-made goods in the performance of a contract with an Arab customer, but may *not* include a certificate, as part of the import and shipping documents, that the goods were not made in Israel.

The exception to the prohibition on negative certifications with respect to carriers and shipping routes is valid only to the extent that certifications of carriers and routing are reasonably necessary to avert war risks or confiscation. If a contract provides that shipment not be made on a flag vessel of a boycotted country, that is acceptable; however, if the customer's contract requires that shipment not be made on a vessel which has ever called on a port in a boycotted country, that is not acceptable.

7.10.3 Compliance with Unilateral Selection

The purpose of this exception is to allow a U.S. supplier to go along with the selection of certain carriers, insurers, and suppliers of services or goods by a boycotting country, a national of a boycotting country, or a resident of a boycotting country (including a U.S. citizen). However, there are conditions to this exception. In the case of services, a substantial portion of the services should be performed in the boycotting country. In the case of goods, the source at the time of import by the boycotting country must be clearly identifiable by either uniqueness of the product's design or appearance, or by trademark or other normal identification.

For this exception to apply the selections must be specific (*i.e.*, actually name a particular supplier), unilateral (*i.e.*, made by the buyer without any assistance from a U.S. person), and made by a resident of the boycotting country. While the provision of pre-award services by a U.S. contractor (including the compilation of lists of qualified bidders, for example) does not in and of itself destroy the exception, such services cannot be boycott-based. Therefore, such lists cannot exclude a company because it is blacklisted, nor can such lists designate which prospective bidders engage in activities that would cause them to be blacklisted. And, of course, residency in a boycotting country must be *bona fide* residency. Residency established solely for the purpose of avoiding the anti-boycott regulations will not suffice.

7.10.4 Requirements on Exports from Boycotting Countries

As a corollary to the first exception concerning import requirements of a boycotting country, the fourth exception permits compliance with restrictions imposed by a boycotting country in relation to its own exports. Thus, a U.S. person may comply or agree to comply with laws of a boycotting country aimed at keeping its exports away from a boycotted country, so long as the U.S. person does not make an across-the-board refusal to do business by the U.S. person with the boycotted country or any of its nationals.

7.10.5 Compliance with Visa Requirements

A limited exception to the anti-boycott laws permits U.S. individuals to comply, or agree to comply, with passport, immigration, visa, or employment requirements of a boycotting country. However, this encompasses only information furnished by the individual about his, or his immediate family's, eligibility for employment in the boycotting country, and does not extend to other persons.

In contemplation of assigning one or more of its employees to a boycotting country, a U.S. firm may only permit its affected employees to provide the requested information, and may not itself provide that information. The employer firm, however, may perform various ministerial functions, such as typing, translation, and messenger service.

7.10.6 Compliance with Local Law

As stated in the EAR, the compliance with local law exception is really two exceptions: first, U.S. persons may comply with local law while exclusively within a foreign country; and second, U.S. persons resident in a foreign country may comply with local import laws. In both instances, this exception applies strictly to U.S. persons resident in a foreign country. So long as a U.S. person is a *bona fide* resident of a foreign country, he may comply, or agree to comply, with all of the laws of that country with respect to his activities exclusively within that country.

Once again, a key distinction should be noted between section 8 of the Export Administration Act and section 999 of the Internal Revenue Code. Under section 999 of the Internal Revenue Code, a U.S. taxpayer will be deemed to have agreed to participate in or cooperate with the boycott if that taxpayer enters into any contract which requires compliance with a boycotting country's laws and regulations, even if that contract makes no mention of boycott laws.

While this may again appear to be an obvious matter of common sense, since we all should "do as Romans do when in Rome," there is the element of extraterritoriality to be considered. Thus, while this exception covers compliance with regard to matters that can and must be performed within the host (boycotting) country, it does not cover acts of compliance that necessarily must be performed outside the host country. If a subsidiary of a U.S. company that operates in a boycotting country is required to render reports about its parent company's operations in a boycotted country, it may do so long as it can comply without gathering information outside of the host country. Similarly, that subsidiary may agree not to hire Israeli nationals in its Saudi Arabian plant without violating U.S. law, but it cannot agree that its parent in the United States shall refrain from employing Israelis.

When this exception is applied to the importation of goods by a U.S. person resident in a foreign country, it becomes somewhat narrower. A U.S. person may agree to comply with local law restricting imports of goods so long as several conditions are satisfied. First, the transaction must involve the importation of goods; second, the items must be for the U.S. person's own use or for that person's use in performing contractual services within the host country; and third, in the normal course of business, the source of

the goods at the time of their entry into the host country must be identifiable by the uniqueness of design or appearance, or by trademark, trade name, or some other identification normally on the items themselves.

The examples furnished in the EAR indicate some of the fine lines that must be drawn. In addressing the problem of what is considered "imports for U.S. person's own use," the EAR cites the case of a U.S. contractor building a hospital in a boycotting country on a turnkey basis. Although the U.S. contractor may comply with the host country's blacklist of certain suppliers (since the products involved would be for the hospital), the contractor could not lawfully refuse to deal with blacklisted architects, because the exception does not apply to the import of services. Similarly, that contractor may not comply with blacklist laws in reference to the acquisition of office equipment for the hospital if such equipment is not a part of the scope of work for which the contractor was paid.

7.11 OTHER APPLICABLE RULES CONCERNING EVASION, REPORTING AND RECORDKEEPING

7.11.1 Evasion Provisions

Because of the opportunities to engage in practices designed to avoid the impact of the EAR, the Department of Commerce went to considerable effort to delineate some of the practices that would be considered evasive and therefore illegal.

Among examples of illegal evasion by U.S. persons are:

- Asking a supplier of a commodity to stamp his trade name on the product (though he ordinarily does not do so) in order to come within the unilateral selection exception.
- Being placed on a blacklist because of a refusal to respond to a boycott-related request for information, and then sending an annual report a year later for no substantially boycott-unrelated business reason.
- Using distributors and dummy companies to engage in practices that would be illegal if performed by the U.S. company.
- Diverting a boycotting country order to a foreign subsidiary or affiliate whose operations are outside of U.S. commerce, because the U.S. firm cannot lawfully comply with the customer's boycott requirements.

For example, in one enforcement action, a wholesale company threatened purchasers that buying from blacklisted companies would result in a termination of dealings with the wholesaler.[33] Such a statement violated the evasion provisions of the anti-boycott regulations because it transferred the hazard of the boycott to the purchaser, while allowing the wholesaler seemingly to avoid regulation.

7.11.2 Reporting Requirements

Any U.S. person receiving a request to take any action furthering or supporting a restrictive trade practice or boycott fostered or imposed by a foreign country against a country friendly to the United States or against any U.S. person must report such request to the Department of Commerce. Because the term "restrictive trade practice" is not defined anywhere in the law or the EAR and because common rules of construction require a broad interpretation of the term (considering its use alongside the more specific boycott language), arguably this requirement could extend to any request or other communication entailing any course of conduct which could fall within the scope of U.S. antitrust laws.

The forms for reporting such transactions are in Table 7-2 (Form BXA-62IP for single transaction) and in Table 7-3 (Form BXA-6051P for multiple transactions).

7.11.2.1 General Rule

The general rule is that any request is reportable if the person knows or has reason to know that the purpose of the request is to enforce, implement, or otherwise further or support an unsanctioned foreign boycott.

It is important to emphasize that the *receipt* of a request to take boycott-related action or to furnish boycott-related information is the event which "triggers" the reporting obligation. Thus, the receipt of a request to provide boycott-related information must be reported, even if the U.S. firm in question does not intend to comply with the request. Moreover, a request need not require any type of response to

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[33] See *Wholesale Electric Supply Co.*, 7 Int'l Boycotts (BLI) 10,0001.092 (1993).

fall within the purview of the reporting requirements.[34] Compliance efforts must be diligent, as reportable requests may be buried in purchase orders and other standard documents.

It should also be noted that the concept of a "U.S. person" for purposes of the reporting requirements is identical to the definition of a "U.S. person" under the substantive provisions of the anti-boycott regulations. Thus, a foreign subsidiary of a U.S. corporation must file a report of the receipt of a request to take boycott-related action, if that request relates to a transaction in "U.S. commerce."

7.11.2.2 Exceptions

There are exceptions to the general rule, however:[35]

- Negative requests in relation to use of foreign flag shippers.
- Requests to ship via a prescribed route or to refrain from shipping via a prescribed route.
- Requests to supply an affirmative statement or certificate of origin.
- Requests to supply affirmative statements regarding name of supplier or manufacturer of goods.
- Requests to comply with the laws of another country except where such requests relate specifically to boycott laws.
- Requests of individuals to provide information about themselves or members of their families for passport, visa, or employment purposes.
- Requests to supply statements regarding the destination of exports or confirmation of the destination of a cargo.
- Requests to supply a certificate that a mode of transportation is permitted.
- Requests to supply a certificate that an insurance company has an agent in a boycotting country.
- Requests for a "risk of loss clause."

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[34] See, for example, Department of Commerce News Release BXA-97-23, regarding settlement with Samsonite Corporation; and BXA Case Nos. 92-26A and 92-26B regarding Sundstrand Corporation and its French subsidiary (Dec. 4, 1995).

[35] 15 C.F.R. § 760.5(a)(5).

7.11.3 Recordkeeping Requirements

Any U.S. person receiving a reportable boycott request must retain records and information relating to the request for a period of five years following receipt.[36] For example, copies of all documents in which a reportable boycott request appears must be maintained. The Department of Commerce may require that these materials be submitted to it or that it have access to them at any time within that period.[37]

7.12 APPLICATION OF RULES—CASE EXAMPLE

In one of the few anti-boycott prosecutions to find a place in U.S. federal case reports, *United States v. Meyer*[38] illustrates several principles applicable to the anti-boycott rules, the most important being that a person intentionally violates the anti-boycott rules if he provides information concerning a client's business relationship with a boycotted country to a foreign agency knowing that the information pertains to an unsanctioned foreign boycott.

The facts in *Meyer* were neither disputed nor complex. Attorney Robert Meyer attempted to register his client's trademark in Saudi Arabia. Meyer received an Authorization of Agent form from the Saudi registration office that asked the registrant to declare that it did not have a business relationship with Israel. Meyer completed the form and mailed it to the Saudi embassy in Washington which, in turn, advised Meyer that the form needed to be authenticated by the U.S. State Department. Meyer then endeavored to obtain authentication through a Virginia attorney, but the latter could not prevail upon the State Department to do so because of the boycott issue and reported that fact to Meyer. Ultimately, Meyer sent the completed, but unauthenticated, form to the Saudi registration office, and was charged by the Commerce Department with a violation of 15 C.F.R. § 760.5(a)(1) (failing to report requests for boycott information) and of 15 C.F.R. § 760.2(d)(1) [§ 769.2(d)(1)]

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[36] 15 C.F.R. §§ 762.2(b)(32) and 762.6(a).

[37] See Department of Commerce News Release BXA-96-14, regarding settlement with Arab Banking Corporation, for an example of recordkeeping violations.

[38] 864 F.2d 214 (1st Cir. 1988).

(prohibition against furnishing of business relationship information with boycotted countries).

As indicated above, the EAR provides that a person intentionally complies with an unsanctioned foreign boycott by supplying commercial information to boycott authorities with the knowledge that the information was sought for boycott purposes.[39] Moreover, intent to comply with unsanctioned foreign boycotts is presumed from knowingly providing the boycott information.[40] Overlaid on these principles, however, are general principles of criminal and constitutional law, among which is the rule that constitutional due process generally requires the government to prove each material element of a crime beyond a reasonable doubt.[41] This standard applies to elements of crimes that require proof that defendants were aware that their actions were illegal.[42] Thus, if the government were required to prove that Meyer not only intentionally provided the offending information to the Saudi authorities, but that he knew that he was acting illegally, Meyer may have had a viable defense.[43]

The First Circuit Court of Appeals affirmed the district court's decision. As pointed out in a recent law review comment on the case,[44] "[s]uccessful reliance upon an ignorance of the law defense usually requires a judicial determination that the government failed to afford a defendant reasonable notice of the law criminalizing the defendant's conduct. . . . Dismissing Meyer's ignorance of the law defense, the majority [of the appellate panel] observed that the Commerce Department published the pertinent regulations and that Meyer was aware of the boycott issue. The court further noted that Meyer had not argued that he was entitled to particularized notice of the regulations' existence. Acknowledging that persons do not violate anti-boycott regulations if they act inadvertently, the court held that Meyer met the intent requirement of the regulations by

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[39] 15 C.F.R. § 760.1(e)(3).

[40] 15 C.F.R. § 760.1(e)(5)-(6).

[41] See Comment, 23 Suffolk University Law Review 1148 (1989), especially the authorities cited therein at n.28.

[42] *Id.* at n.29.

[43] In affirming the Commerce Department's fine, the district court noted that Meyer did not consciously intend to violate the law. That finding prompted Meyer to appeal to the First Circuit Court of Appeal.

[44] *Op cit. n.5 supra.*

providing information concerning his client's business relationship with Israel, knowing that the information was boycott-related."[45]

There are other issues present in this decision that may be of peripheral interest to administrative law and criminal law specialists, but the case is relevant to this anti-boycott analysis by illustrating one of many factual contexts in which the courts may apply anti-boycott rules and related standards of civil and criminal responsibility.

7.13 LEGAL CONSEQUENCES OF THE LAPSE OF THE EAA

In 1994, Congress allowed the Export Administration Act (EAA) to lapse. Although the Clinton Administration invoked its emergency powers under the International Emergency Economic Powers Act (IEEPA)[46] to extend the Export Administration Regulations (EAR) (which include the anti-boycott restrictions),[47] the subsequent failure of Congress to reenact the EAA has led to a questionable legal status of the EAR. As one official testified before a House subcommittee, "the absence of specific anti-boycott references in IEEPA has led some respondents to argue . . . that BXA (Department of Commerce, Bureau of Export Administration) has no authority to implement and enforce the anti-boycott provisions of the EAA and Export Administration Regulations."[48] While such arguments have yet to be validated in the courts, the BXA official further warned House members that "[t]he longer the EAA lapse continues, the more likely we will be faced with challenges to our authority."[49] It seems that these issues must eventually be resolved

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[45] *Id.* at 1153. Footnotes omitted.

[46] 50 U.S.C. app. 1701 *et seq.* (1996).

[47] Exec. Order No. 12,924, 59 Fed. Reg. 43,437 (Aug. 19, 1994).

[48] Testimony of William A. Reinsch, Under Secretary for Export Administration, on Reauthorization of the Export Administration Act, March 3, 1999, http://www.bxa.doc.gov/PRESS/99/EAAReauth.html. One such case, the combined Serfilco, Ltd./Jack H. Berg appeal, challenged the fundamental authority of the Commerce Department to enforce the anti-boycott provisions of the EAR under IEEPA. The argument was ignored by the Department, but the extension of anti-boycott rules has yet to be heard by a court. 61 Fed. Reg. 30,216, final decision regarding Serfilco, Ltd. and Jack H. Berg, Respondents (June 14, 1996).

[49] Testimony of William A. Reinsch, Under Secretary for Export Administration, on Reauthorization of the Export Administration Act, March 3, 1999, http://www.bxa.doc.gov/PRESS/99/EAAReauth.html.

in the courts. However, respondents interested in challenging anti-boycott enforcement under emergency powers should bear in mind that there is likely a different procedure of judicial review under the IEEPA than existed under the EAA.[50]

7.14 TAX ASPECTS OF BOYCOTT ACTIVITIES

Around the time that Congress enacted the anti-boycott amendments to the Export Administration Act in 1977, it also adopted the Tax Reform Act. This legislation also addressed boycott activities of the Arab League by denying tax benefits to U.S. companies and their foreign affiliates who cooperated with the boycott of Israel. As shown by Table 7.1, however, the treatment of boycott activities by the EAA amendments and the Tax Reform Act of 1976 is not internally consistent. Some activities permissible under part 760 of the EAR may result in the loss of tax benefits otherwise available under the Internal Revenue Code, and some boycott-related activities that are permissible (*i.e.*, do not result in the loss of tax benefits) are prohibited by the EAR.

This portion of the anti-boycott discussion is not intended to be exhaustive by any means. The reader should consult with counsel in attempting to deal with any aspect of tax planning or, indeed, in considering whether any given set of circumstances in this context implicates the anti-boycott provisions of the Internal Revenue Code.

7.14.1 Applicable Substantive Provisions

Section 999 of the Internal Revenue Code imposes reporting requirements upon "U.S. Persons" where participation in or cooperation with an international boycott is required as a condition of doing business within a country. A "U.S. Person" in this setting is a citizen or resident of the United States, a domestic partnership, a domestic corporation, and any estate or trust that does not exclude from income its foreign-source income not effectively connected with the conduct of a trade or business within the United States. A U.S. person must file the required report with the Internal Revenue Service if it:

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[50] The IEEPA utilizes the judicial review provisions under the Administrative Procedure Act (5 U.S.C. §§ 701-706).

- has operations,
- is a member of a controlled group a member of which has operations,
- is a U.S. shareholder with 10 percent or more of the voting power of a foreign corporation that has operations,
- is a partner in a partnership with operations,
- is the owner of a trust with operations,

in or related to a boycotting country where participation in or cooperation with an international boycott is required as a condition of doing business within that country.

In addition to the reporting requirements described above, all operations of a U.S. person (or the group that includes the person) who participates or cooperates with an international boycott in a country in connection with which the agreement was made will be presumed to be "boycott operations." Benefits otherwise available under the Internal Revenue Code for foreign tax credits, foreign tax deferral, and DISC (Domestic International Sales Corporations) and FSC (Foreign Sales Corporations) income are lost to the taxpayer to the extent they are derived from "boycott operations." The amount of the loss of these benefits is derived by application of the "international boycott factor" to the worldwide foreign income of the taxpayer. Thus, assuming that a taxpayer's foreign income would be entitled to a foreign tax credit of $1,000,000, and 25 percent of that foreign income was derived from "boycott operations," 25 percent of the foreign tax credit would be lost.

The same principles are applied to income of controlled foreign corporations of the taxpayer where such income would not ordinarily be recognized prior to its distribution to the U.S. parent. To the extent that such income is derived from "boycott operations," it will be treated as though it was distributed to the U.S. parent as "Subpart F Income" as defined in that part of the Internal Revenue Code.

Finally, the tax benefits gained through the use of DISCs and FSCs are reduced to the extent that the income attributable to these entities is derived from "boycott operations."

Safe harbors have been carved out for U.S. companies operating in boycotting environments. "Incidental contracts" are excluded from "boycott operations." These generally include relationships or transactions where no requests for boycott agreements or boycott agreements themselves exist. Additionally, "boycott operations" exclude

any *de minimis* transactions (< $5,000) and cases where there is no importation of property, funds or services from a boycotting country or where there is no utilization, consumption, or disposal of property, funds or services in the boycotting country.

7.14.2 Differences Between EAR and IRC Treatment of Boycott Issues

As indicated above, there are significant differences between the EAR and the Internal Revenue Code. These differences extend to coverage in terms of how foreign subsidiaries of U.S. parents are treated. For example, the tax treatment of boycott activities extends to "all controlled foreign subsidiaries [>50% of the shares owned by the U.S. parent]" whereas the EAR covers all "controlled in fact" subsidiaries and control may be established by means other than proof of voting share ownership. In this respect, a number of the rulings of the Office of Anti-Boycott Compliance have found control to be present where the actual percentage of stock ownership is far less than 50 percent.

There are subtle differences between the two regimes in terms of their objectives. Whereas the Internal Revenue Code requires proof of an *agreement* in order to establish culpability under that statute, no agreement is required under the EAR and, in fact, merely perpetrating one or another defined "boycott activities" (such as furnishing information) is sufficient to establish culpability under the EAR.

Finally, it is important to note that the penalties to which a U.S. person may be subjected to under the Internal Revenue Code are cumulative with those under the EAR. Under the tax law, such penalties are additional to the loss of tax benefits described above and, of course, do not foreclose the imposition of fines and other civil and criminal sanctions by the Office of Anti-Boycott Compliance.

TABLE 7-1

Requests for Boycott-Related Action Under the United States Anti-Boycott Regulations
(Reproduced by permission of John McKenzie, Esq., Baker & McKenzie)

		Export Administration Regulations[1]		IRC § 999[2]
	Requested Boycott Action	**Reporting Regulations[3]**	**Substantive Regulations[4]**	**Treasury**
1.	Provision of a positive certificate of origin.	Not reportable	Permitted	Permitted
2.	Provision of a negative certificate of origin.	Reportable	Prohibited after June 21, 1978	Permitted
3.	Provision of a "war risk" certificate re: Israeli flag vessel	Not reportable	Permitted	Permitted
4.	Provision of a "war risk" certificate re: vessel owned by, or chartered to, an Israeli person or firm	Not reportable	Permitted	Permitted
5.	Provision of a "war risk" certificate re: vessel not scheduled to call at Israeli port prior to arrival at port of destination	Not reportable	Permitted	Permitted
6.	Provision of a "non blacklisted vessel" certificate	Reportable	Prohibited after June 21, 1978	Prohibited
7.	Provision of a "no blacklisted supplier" certificate (self-certification)	Reportable	Permitted	Permitted

TABLE 7-1 (CONTINUED)

		Export Administration Regulations[1]		IRC § 999[2]
	Requested Boycott Action	**Reporting Regulations[3]**	**Substantive Regulations[4]**	**Treasury**
8.	Provision of a "no blacklisted supplier" certificate (certification as to third parties)	Reportable	Prohibited after June 21, 1978	Prohibited
9.	Provision of "Vessel Eligible" Certificate (Egypt, Jordan, and Saudi Arabia)	Not reportable	Permitted	Permitted
10.	Provision of "Vessel Eligible" Certificate, to be made by the Exporter (countries other than Egypt, Jordan, and Saudi Arabia)	Reportable	Prohibited	Prohibited*
11.	Provision of "Vessel Eligible" Certificate, to be made by the vessel owner	Not reportable after July 1, 1992	Permitted	Prohibited*
12.	Provision of "Insurer's Resident Agent Certificate (Egypt, Jordan, and Saudi Arabia)	Not reportable	Permitted	Permitted
13.	Provisions of "Insurer's Resident Agent" Certificate, to be made by the Exporter (countries other than Egypt, Jordan, and Saudi Arabia)	Reportable	Prohibited	Prohibited

TABLE 7-1 (CONTINUED)

		Export Administration Regulations[1]		IRC § 999[2]
	Requested Boycott Action	**Reporting Regulations[3]**	**Substantive Regulations[4]**	**Treasury**
14.	Provisions of "Insurer's Resident Agent" Certificate, to be made by the Insurer	Not reportable after July 1, 1992	Permitted	Prohibited
15.	Certification as to identity of supplier, shipping company, insurance carrier, etc.	Not reportable	Permitted	Permitted
16.	Compliance with unilateral selection of supplier, shipping company, etc. by Arab customer	Not reportable unless recipient knows or has reason to know that selection is boycott-based	Permitted (under limited circumstances)	Permitted
17.	Provision of "seven questions" information	Reportable	Prohibited (except by bona fide resident of boycotting circumstances)	Permitted unless furnished pursuant to a prior agreement
18.	Agreement to comply with laws of boycotting country (stated generally)	Not reportable	Permitted	Prohibited
19.	Agreement to comply with boycotting country's boycott laws	Reportable	Prohibited	Prohibited

TABLE 7-1 (CONTINUED)

		Export Administration Regulations[1]		IRC § 999[2]
	Requested Boycott Action	**Reporting Regulations[3]**	**Substantive Regulations[4]**	**Treasury**
20.	Agreement not to do business with or in Israel	Reportable	Prohibited	Prohibited
21.	Agreement not to obtain goods covered by specific order from Israel or form an Israeli firm	Reportable	Permitted	Permitted
22.	Negotiation of a Letter of Credit prohibiting shipment of Israeli goods	Reportable	Permitted, provided no certification is made	Permitted
23.	Negotiation of a Saudi Letter of Credit prohibiting shipment of goods or packaging bearing any symbols prohibited in Saudi Arabia	Not reportable	Permitted	Permitted
24.	Negotiation of a Letter of Credit prohibiting shipment of goods or packaging bearing a six-pointed star	Reportable	Prohibited	Permitted
25.	Agreement not to do business with a blacklisted United States person or firm	Reportable	Prohibited	Prohibited

TABLE 7-1 (CONTINUED)

	Requested Boycott Action	Export Administration Regulations[1] Reporting Regulations[3]	Substantive Regulations[4]	IRC § 999[2] Treasury
26.	Agreement not to obtain goods covered by a specific order from a blacklisted United States person	Reportable	Prohibited	Prohibited
27.	Agreement to "Risk of Loss" Provision	Not reportable[5]	Permitted	

1. The analysis of the Commerce Department's Anti-Boycott Regulations set forth in this chart assumes that the boycott-related request is received by a "United States person" and that the request relates to a transaction within "the interstate and foreign commerce of the United States," so that jurisdiction prerequisites are satisfied.

2. Internal Revenue Code § 999 provides for the imposition of tax penalties where a Unites States taxpayer, or its foreign affiliate, *agrees*, as a condition of doing business in an Arab country, to participate in or cooperate with the boycott of Israel. Certification requirements contained in a letter of credit issued in connection with a sales transaction are deemed to be additional terms of the sales contract. Thus, a compliance with a prohibited boycott-related letter of credit certification requirement is deemed to constitute an agreement to participate in the boycott.

3. The *receipt* of a boycott request is the reportable event, regardless of how the recipient responds, or intends to respond, to the request.

4. This column indicates legality or illegality of compliance with specific boycott requests under the substantive Commerce Department Anti-Boycott Regulations.

5. The receipt, after July 1, 1982, of a request for agreement to a "risk of loss" provision is not reportable, provided the firm from which the request is received adopted a policy of requiring agreement to such provisions in its contracts or purchase orders prior to January 18, 1978.

* The Treasury Department has informally indicated that it may loosen this standard and no longer consider simple "vessel eligible" statements to be boycott related. *See* 1 Int'l Boycotts (BLI) 2001.48 (1997).

Table originally compiled by John McKenzie.

TABLE 7-2

Reporting Requirements: Form BXA-621-P for a Single Transaction

FORM BXA-621P
(REV 10-89)

U.S. DEPARTMENT OF COMMERCE
BUREAU OF EXPORT ADMINISTRATION

REPORT OF REQUEST FOR RESTRICTIVE TRADE PRACTICE OR BOYCOTT
SINGLE TRANSACTION

(For reporting requests described in Part 769 of the Export Administration Regulations)

NOTICE OF RIGHT TO PROTECT CERTAIN INFORMATION FROM DISCLOSURE

The Export Administration Act permits you to protect from public disclosure information regarding the quantity, description, and value of commodities or technical data supplied in Item 11 of this report and in any accompanying documents. *If you do not claim this protection, all of the information in your report and in accompanying documents will be made available for public inspection and copying.*

You can obtain this protection by certifying, in Item 10 of the report, that disclosure of the information referred to above would place a United States company or individual involved in the report at a competitive disadvantage. If you make such a certification in Item 10, you may remove information regarding the quantity, description, and value of the commodities or technical data supplied by you from Item 11 of the inspection copy of the report form and from the public inspection copies of the accompanying documents.

The withholding of this information will be honored by the Department unless the Secretary determines that disclosure of the information would not place a United States company or individual at a competitive disadvantage or that it would be contrary to the national interest to withhold the information.

THIS SPACE FOR BXA USE 958640

A (1) BATCH (2–5)
MONTH/YEAR (6–9)
RSN (10–15) SUBSET (16–17)
RTP (16–27)
CLASS (28) FILING (55) TAG (70–80)

This report required by law (50 U.S.C. App. §2407 (b) (2) P.L. 96-72; E.O. 12214; 15 C.F.R. Part (769). Failure to report can result both in criminal penalties, including fines or imprisonment, and administrative sanctions.

Instructions: 1. Complete all items that apply. 2. Assemble original report form and accompanying documents as a unit, and submit intact and unaltered. 3. Assemble and submit the duplicate copy of report form (marked Duplicate (Public Inspection Copy)) and additional copies of accompanying documents (marked with the legend "Public Inspection Copy.") 4. *If you certify, in Item 10, that the disclosure of the information specified there would cause competitive disadvantage, edit the "Public Inspection Copy" of the documents submitted to exclude the specified information and remove the bottom of the Duplicate "Public Inspection Copy" of the report form relating to Item 11.*

Public reporting for this collection of information is estimated to average one hour per request, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Office of Security and Management Support, Bureau of Export Administration, U.S. Department of Commerce, Washington, D.C. 20230; and to the Office of Management and Budget, Paperwork Reduction Project (0694-0012), Washington, D.C. 20503

1a. Identify firm submitting this report:
Name:
Address:
City, State and ZIP:
Country *(if other than USA)*:
Telephone:
Firm Identification No. *(if known)*: (29-34)

Specify firm type: (35)
☐ Exporter
☐ Bank
☐ Forwarder
☐ Carrier
☐ Insurer
☐ Other

1b. Check any applicable box:
☐ Revision of a previous report (attach two copies of the previously submitted report)
☐ Resubmission of a deficient report returned by BXA (attach form letter that was returned with deficient report)
☐ Report on behalf of the person identified in Item 2
☐ Dual report on behalf of self and the person identified in Item 2

2. If you are authorized to report and are reporting on behalf of another U.S. person, identify that person (e.g., domestic subsidiary, controlled Foreign subsidiary, exporter, beneficiary):
Name
Address:
City, State and ZIP:
Country (if other than USA):
Type of firm: *(see list in Item 1a)*
Firm Identification No. *(if known)*:

3. Identify exporting firm, unless same as Item 1a or 2:
Name:
Address:
City, State and ZIP:
Country (if other than USA):
Firm Identification No. *(if known)*: (36-41) (42)

4. (a) Name of boycotting country from which request orginated:
(b) Name of country directing inclusion of request, if different from (a) above: (43-44)

5. Name of country or countries against which request is directed: (45-46)

6. Reporting firm's reference number *(e.g., letter of credit, customer order, invoice)*: (71-77)

7. Date firm received request: *(use digits for month/day/year)* (47-52)

8. Specify type(s) of document conveying the request: (53-54)
☐ Request to carrier for blacklist certificate *(submit two copies of blacklist certificate or transcript of request)*
☐ Unwritten, not otherwise provided for *(make transcript of request and submit copies)*
☐ Letter of credit
☐ Requistion/purchase order/accepted contract/shipping instruction
☐ Bid invitation/tender/proposal/trade opportunity
☐ Questionaire *(not related to a particular dollar value transaction)*
☐ Other written *(specify)*_____
Submit two copies of each document or relevant page in which the request appears

9. Decision on request: *(Check one)* (56-57)
☐ Have not taken and will not take the action requested.
☐ Have taken or will take the action requested.
☐ Have taken or will take the action requested and claim it is subject to a grace period *(attached detailed explanation)*.
☐ Have taken or will take the action requested but in a modified for *(attach detailed explanation)*.
☐ Unable to report ultimate decision on the request at this time and will inform the Bureau of Export Administration of the decision within ten days after decision is made.

Additional Information: The firm submitting this report may, if it so desires, state on a seperate sheet any additional information relating to the request reported or the response to that request. This statement will constitute a part of the report and will be made available for public inspection and copying, subject to the right to protect certain confidential information from disclosure described in Item 10.

10. Protection of Certain Information from Disclosure: (Check appropriate boxes and sign below)
1. ☐ I (We) certify that disclosure to the public of the information regarding quantity, description, and value of the commodities or technical data contained in:
☐ Item 11 below *(If you check this box*, be sure to remove the bottom of the Duplicate (Public Inspection Copy) of the report form relating to Item 11.)
☐ Attached documents *(If you check this box*, be sure to edit the "Public Inspection Copy" of the documents submitted to exclude the specified information.) would place a United States person involved at a competitive disadvantage, and I (We) request that it be kept confidential.
2. ☐ I (we) authorize public release of all information contained in the report and in any attached documents. I (We) certify that all statements and information contained in this report are true and correct to the best of my (our) knowledge and belief.

Sign here in ink_____ Type or print _____ Date_____

11. Describe the commodities or technical data involved, and specify quanity and value: (58-69)
Description
Quantity:
Value to nearest whole dollar $

ORIGINAL Subject to Office of Antiboycott Compliance BXA, U.S. Department of Commerce, Room 6099-C, Washington, D.C. 20230

Reporting Requirements: Form BXA-6051P for Multiple Transactions TABLE 7-3

Form Approved: OMB No. 0694-0012

FORM BXA-6051P
(REV. 10-89)

U.S. DEPARTMENT OF COMMERCE
BUREAU OF EXPORT ADMINISTRATION

REPORT OF REQUEST FOR RESTRICTIVE TRADE PRACTICE OR BOYCOTT
MULTIPLE TRANSACTIONS (Sheet No. 1)

(For reporting requests described in 769 of the Export Administration Regulations)

THIS SPACE FOR BXA USE 788598

A (1) BATCH (2 5)

MONTH/YEAR (6 9)

NOTICE OF RIGHT TO PROTECT CERTAIN INFORMATION FROM DISCLOSURE.
The Export Administration Act permits you to protect from public discloure information regarding the quantity, description, and value of the commodities or technical data supplied in Item 9 of this report and in any accompanying documents. ***If you do not claim this protection, all of the information in your report and in accompanying documents will be made available for public inspection and copying.*** You can obtain this protection by certifying, in Item 5 of the report, that disclosure of the information regarding the quantity, description and value of the commodities or technical data refrerred to above would place e United States compeny or individual involved in the report at a competitive disadvantage. If you make such a certification in Item 5 , you may remove information regarding the quantity, description, and value of the commodities or technical data supplied by you from Item 9 of the public inspection copy of the report form and from the public inspection copies of the accompanying documents. The withholding of this information will be honored by the Department unless the Secretary determinies that disclosure of the information would not place a United States company or individual at a competitive disadvantage or that it would be contrary to the national interest to withhold the information.

This report is required by law (50 U S.C. App. §2403-1a(b); P.L. 95-52; E.O. 12002; 15 CFR Pert 769). Failure to report cen result both in crimina! penalties, including fines or imprisonment, and administrative sanctions.

INSTRUCTIONS: 1. This form may not include a transaction report that is filed late, nor indicate a decision on request other than those coded in Item 4 below. 2. This form may be used to report on behalf of another United States person if all transactions apply to the person identified in Item 2, but may not be considered as a dual report on behalf of both persons identified in Item 1a and Item 2. 3. Limit each report to 75 transactions or less. 4. Attach as many continuation sheets as needed. Enter sheet number and name of reporting firm on each continuation sheet (starting with Sheet No 2). 5. List each transaction across the continuation sheet, completing all items that apply. Use as many lines as necessary but separate transactions with a blank space or line. 6. Assemble original report form and accompanying documents as a unit, and submit intact and unaltered. 7. Assemble and submit the dupilcate copy of report form (marked Duplicate (Public Inspection Copy)) and additional copies of accompanying documents (marked with the legend "Public Inspection Copy.") 4. *If you certify, in Item 5, that the disclosure of the information specified there would cause competitive disadvantage, edit the "Public Inspection Copy" of the documents submitted to exclude the specified information and remove the right hand portion of the Duplicate (Public Inspection Copy) of the continuation sheet(s) relating to Column 9.* **MULTIPLE TRANSACTIONS**: Public reporting for this collection of information is estimated to average one hour per reported request, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to Office of Security and Management Support, Bureau of Export Administration, U.S. Department of Commerce, Washington, D.C. 20230; and to the Office of Management and Budget, Paperwork Reduction Project (0694-0012), Washington, D.C. 20503.

1a. Identify firm submitting this report:

Neme:
Address:
City, State end ZIP:
Country *(if other than USA):*
Telephone:
Firm Identification No. *(If known)*

Specify firm type:

- [ ] Exporter
- [ ] Bank
- [ ] Forwarder
- [ ] Carrier
- [ ] Insurer
- [ ] Other

1b. Check any applicable box:

- [ ] Revision of a previous report (ettach two copies of the previously submitted report)
- [ ] Resubmission of a deficient report returned by BTR (attach form letter that was returned with deficient report)
- [ ] Report on behalf of the person identified in item 2

2. If you ere authorized to report and ere reporting on behalf of another U.S. person, identify that person (e.g., domestic subsidiary, controlled foreign subsidiary, exporter, beneficiary):

Name.
Address:
City, State and ZIP:

Country *(if other than USA):*
Type of firm: *(see list in item 1a)*

3. REQUESTING DOCUMENT CODES ***(use to code Column 6 of continuation sheet)***

C Request to carrier for blecklist certificate (submit two copies of blecklist certificete or transcript of request)
U Unwritten, not otherwise provided for (make transcript of request and submit two copies)
L Letter of credit
R Requistion/purchase order/accepted contract/ shipping instruction
B Bid invitation/tender/proposal/trade opportunity
Q Ouestionaire (not related to a perticuler doller value transaction)
9 Other written

} Submit two copies of each document or relevent page in which the request appears.

4. DECISION ON REQUEST CODES ***(use to code Column 7 of continuation sheet)***

R Have not taken end will not take the action requested
T Heve teken or will teke the ection requested

5. Protection of Certain Information from Disclosure: ***(Check appropriate boxes and sign Below)***

- [ ] I (we) certify that disclosure to the public of the information regarding quantity, description, and value of the commodities or technical data contained in:
  - [ ] Column 9 of the attached continuetion sheets (If you check this box, be sure to remove column 9 from the Duplicete (Public Inspection Copy)) of the continuation sheets.
  - [ ] Atteched documents *(If you check this box*, be sure to edit the "Public Inspection Copy" of the documents submitted to exclude the specified information.) would place a United States person involved at a competitive disadvantage, and I (we) request that it be kept confidentiel
- [ ] I (we) euthorize public releese of ell information conteined in the report end in eny atteched documents.

I (we) certify that ell stetements end information contained in this report ere true end correct to the best of my (our) knowledge end belief.

Sign here in Ink _____ Type or print _____ Date _____

ORIGINAL - Submit to Office of Antiboycott Compliance, BXA, Room 6099C, U.S. Department of Commerce, Washington, D.C. 20230

USCOMM-DC 95-24176

Chapter 8: Enforcement of Export Controls

Chapter 8: Enforcement of Export Controls

CHAPTER 8

ENFORCEMENT OF EXPORT CONTROLS*

8.1 Introduction and Basic Concepts
- **8.1.1 Export as a Privilege**
- **8.1.2 Structure of Part 764**
- **8.1.3 Violations**
- **8.1.4 Violations vs. Prohibitions**
- **8.1.5 Violations vs. Requirements**
- **8.1.6 Violators**
- **8.1.7 Other Violation Changes**
- **8.1.8 Knowledge**
- **8.1.9 Possession**

8.2 Intentional Violations
- **8.2.1 Criminal Sanctions**
- **8.2.2 Administrative Sanctions**

8.3 Inadvertent Violations

8.4 Operation EXODUS

8.5 Violations of U.S. Controls
- **8.5.1 Vicarious Liability for Employee**
- **8.5.2 Vicarious Liability for Company**
- **8.5.3 Being Put on Notice**
- **8.5.4 Reporting Obligations**
- **8.5.5 Violation Charged**
  - **8.5.5.1 Administrative Proceedings**
  - **8.5.5.2 Form of Charge**
  - **8.5.5.3 Publicizing Administrative Proceedings**

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*This chapter was revised with the assistance of Johnny Traboulsi, a summer associate of McKenna & Cuneo.

8.5.5.4 Opportunity to Defend
8.5.5.5 Settlement
8.5.5.6 Discovery
8.5.5.7 Limitations on Defense
8.5.6 Appeal
8.5.7 Penalties
8.5.7.1 Denied Persons List
8.5.7.2 Temporary Denial Orders
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Appendix 8-2 Extraterritorial NPPA Sanctions Legislation

8.1 INTRODUCTION AND BASIC CONCEPTS

This chapter examines enforcement of export controls administered by the Departments of Commerce, State, and Treasury. Commerce controls have been enforced since their inception. In the early 1980s, however, enforcement activity increased significantly. The invasion of Afghanistan by the Soviet Union, the imposition of martial law in Poland, the KAL 747 "shootdown," and the heightened concern that too much strategic U.S. technology was leaking to the Soviet Union and its allies led not only to the adoption of a more stringent control policy but also to a significant increase in resources applied to the enforcement of controls.

Enforcement activity has not abated since then, although the emphasis has shifted from East-West COCOM controls to North-South non-proliferation and anti-terrorism controls. Enforcement efforts overall have been, and are being, applied rigorously and conspicuously. Indeed, in recent years, Export Administration Act (EAA) enforcement has even extended to exports of non-U.S. origin by foreign persons.[1]

With COCOM's demise, the U.S. Government intensified its enforcement efforts, especially in non-proliferation cases, because of its overarching concern with these issues and its perception that it is largely "on its own," because existing multilateral regimes are less disciplined than COCOM was.

In 1996, the Export Administration Regulations (EAR) were radically reformed. This reform broadened the scope of possible violations, increased penalties, lessened voluntary disclosure incentives, and tightened procedural rules. It must, therefore, be considered carefully from those aspects.

8.1.1 Export as a Privilege

A feature of the EAR retained in 1996 becomes obvious in part 764: the concept that exporting is a privilege that can be conferred, denied, or withdrawn. This concept has been a linchpin of the EAR from its inception; yet, under the language of the EAA, there does not appear to exist a legal basis for the BXA prohibition of use of

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[1] See section 8.6 *infra*.

any License Exception among the sanctions which may be applied.[2] Even if there had been such a basis, the EAA expired in August 1994 and, as of June 2000, had not been renewed. There is no explicit authority to deny such "export privileges" in the International Emergency Economic Powers Act (IEEPA), emergency legislation that now serves as the legal basis for continuing U.S. export controls. IEEPA section 203(a)(B) authorizes nullifying or voiding any exportation of, or exercising of any privilege with respect to, property in which a foreigner has an interest. But this authority, like all other IEEPA authorities, may be exercised only "to deal with an unusual and extraordinary threat." It is a stretch to interpret permanent export controls with worldwide applicability as necessary to deal with an unusual and extraordinary threat, as the government has been doing for six years. It is even more of a stretch to use the most extreme authorities in IEEPA in connection with run-of-the-mill violations of continuing controls on exports to virtually all foreign destinations.

Section 4 of the EAA spoke of the "Right to Export." Section 3 of the EEA limited the application of export controls to cases where they

> . . . are necessary to further fundamental national security, foreign policy, or short supply objectives.

If section 4 of the EAA has any meaning at all, *i.e.*, exporting is indeed a right rather than a privilege, then the authority of such sanctions as EAA section 13(d) (withdrawal of "export privileges" to prevent imminent violations) would be limited to export transactions that are prohibited in the absence of a license.

Prior to the 1996 regulatory reform, BXA interpreted general license authorities to be as much "licenses" as validated export licenses or reexport authorizations. However, since 1996 only export or reexport licenses issued by the government for specific transactions have been called licenses and what were formerly called general licenses are now called License Exceptions or No License Required (NLR). A principal feature of the reformed EAR is that an action not prohibited is permitted:

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[2] 15 C.F.R. § 764 Supplement 1(b) First A.

> A person may undertake transactions subject to the EAR without a license or other authorization, unless the regulations affirmatively state such a requirement.[3]

The argument boils down to a simple question: if an item may be exported from the United States under a License Exception from the stated licensing requirements or an NLR provision, can BXA prevent someone from exporting it? If one embraces the "privilege" concept of the control regime, the answer is "yes." If one embraces the "right" concept, the answer may be "no." Without legislation to clarify this matter, the issue will remain unresolved. However, the prudent exporter will assume that BXA's "privilege" position will prevail, and govern himself or herself accordingly.

8.1.2 Structure of Part 764

Part 764 consolidates the violations enumerated in various sections of former 15 C.F.R. part 787A under a single section, 15 C.F.R. § 764.2, and then deals with administrative and criminal sanctions in 15 C.F.R. § 764.3. Part 764 retained part 15 C.F.R. § 787A's provisions dealing with notification of violations and voluntary self-disclosure of violations, but moved and expanded the recordkeeping provisions, previously found at 15 C.F.R. § 787A.13 to 15 C.F.R. § 762. This chapter focuses on the important substantive changes that have been embroidered into the new EAR as reformed in 1996 and amended up to June 2000.

8.1.3 Violations

It would appear at first blush that the only changes to the violations of 15 C.F.R. § 764 were organizational in nature; but this is not true. For example, 15 C.F.R. § 764.2(a) provides:

> Engaging in Prohibited Conduct. No person may engage in any conduct prohibited by, or contrary to, or refrain from engaging in any conduct required by, the EAA, the EAR, or any order, license or authorization issued thereunder.

This section subsumed and expanded former 15 C.F.R. § 787A.6, which provided that

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[3] 15 C.F.R. § 736.1, second sentence.

> . . . no person may export, dispose of, divert, direct, mail or otherwise ship, transship, or reexport commodities or technical data . . . in violation of . . . any regulation . . .

The language in 15 C.F.R. § 764.2(a), "conduct prohibited . . . or . . . conduct required" could be construed to cover more than the previous wording, for example, the activities related to exports or even unrelated to exports prohibited by 15 C.F.R. § 744 as well as other supporting activity, such as recordkeeping, export clearance, financing, and counseling.

Commerce officials informally advise that the revised language in 15 C.F.R. § 764.2(a) simply records the manner in which the old EAR was interpreted. But the new EAR definition of "violations" is literally substantially broader than the old. If it does nothing else, it clarifies a broad intent.

8.1.4 Violations vs. Prohibitions

The previous EAR implied that the prohibitions relevant to violations subject to sanctions were limited to provisions concerning export and reexport license requirements[4] or proliferation activities of U.S. persons.[5]

The reformed EAR was restructured to list ten General Prohibitions in one place[6] and also to list violations subject to sanctions in one place.[7] The two lists are not entirely consistent and both are open-ended.

General Prohibitions include a proscription of conduct constituting some, but not all, of the listed violations. General Prohibition Four (denial orders) corresponds with violation (k); General Prohibition Nine (orders, terms, and conditions) corresponds with part of violation (a); and General Prohibition Ten corresponds with violation (e). Another part of violation (a) is repeated after the first "or" in the following portion of the introduction to the General Prohibitions:

> If you violate any of these ten general prohibitions, or engage in other conduct contrary to the Export Administration Act, the

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[4] 15 C.F.R. § 770A.3(a) and 15 C.F.R. § 774A.1.
[5] 15 C.F.R. § 778A.9.
[6] 15 C.F.R. § 736.2(b).
[7] 15 C.F.R. § 764.2.

> EAR, or any order, license, License Exception, or authorization issued thereunder, as described in part 764 of the EAR regarding enforcement, you will be subject to the sanctions described in that part.[8]

But the remainder of violation (a) and all of violations (b-d) and (f-j) are omitted from General Prohibitions part 736 altogether. Moreover, the words "violate" as used in § 736.1(c) and "violation" as used in § 736.2(b)(9) and (10) are not defined, either by cross reference to 15 C.F.R. § 764.2 or by any other means.

Conversely, the first of the listed violations includes the following:

> No person may engage in any conduct prohibited by . . . the EAR . . .[9]

but the expression "prohibited by . . . the EAR" is not defined, either by cross-reference to the General Prohibitions or by any other means.

Thus, both the General Prohibitions and the violations are open-ended.

8.1.5 Violations vs. Requirements

This open-endedness is compounded by defining inaction as a violation:

> No person may . . . refrain from engaging in any conduct required by . . . the EAR . . . .[10]

Despite gathering General Prohibitions in part 736, the revised EAR does not consolidate requirements in one place. A conservative interpretation of "required by . . . the EAR" would be scrupulous compliance with everything in every part thereof, except part 730, which includes the following "Advisory information":

> . . . the information in this part is . . . not expressed with regulatory precision. The controlling language is the language of succeeding parts . . . . You should not take any action based solely on what you read in this part.[11]

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[8] 15 C.F.R. § 736.1(c).
[9] 15 C.F.R. § 764.2(a).
[10] 15 C.F.R. § 764.2(a).
[11] 15 C.F.R. § 730.10.

Such "advisory information" does not apply to other parts of the EAR which do not appear to be expressed with regulatory precision either, such as 15 C.F.R. § 732 "Steps for using the EAR" and introductory sections in many of the other parts.

Thus, exporters should become familiar with the entire EAR (excluding only 15 C.F.R. § 730 while including "Steps," introductions, and supplements) in order to avoid action, or inaction, that would constitute a violation subject to fines or imprisonment.

8.1.6 Violators

The "No person" in the violation descriptions in 15 C.F.R. § 764.2 is not limited to persons subject to U.S. jurisdiction nor to persons involved in an export or a reexport for which a license is required. For example, the EAR continues requirements concerning proliferation-related activities of U.S. persons described in 15 C.F.R. § 744.6 and now contains an additional requirement that

> [N]o person may ... Take any action that facilitates the acquisition or attempted acquisition by a denied person of the ownership, possession, or control of any item subject to the EAR that has been or will be exported from the United States ....[12]

Moreover, the reformed EAR adds:

> Acting through [an] agent or delegation or redelegation of authority, does not relieve anyone of responsibility for compliance with the EAR.[13]

8.1.7 Other Violation Changes

Former 15 C.F.R. § 787A.8, failure to answer interrogatories, and 15 C.F.R. § 787A.9, licensee accountable for use of license, have been discontinued. However, their substance is probably presumed to continue under the broadly drafted 15 C.F.R. § 764.2(a).

15 C.F.R. § 764.2(g) takes cognizance of the fact that the EAA itself is subject to frequent lapses by referring to investigations conducted under, and transactions subject to the authority of, the EAR instead of the EAA.

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[12] 15 C.F.R. § 764 Supplement 1(b) Second B.

[13] 15 C.F.R. § 758.1(c); omitted from 15 C.F.R. § 786A.3(e)(4).

In referring to the recordkeeping requirements of the EAR, 15 C.F.R. § 764.2(i) expanded former 15 C.F.R. § 787A.7, which extended only to the reporting requirements of the EAA and rules issued thereunder.

8.1.8 Knowledge

A revised definition of "knowledge" affects not only what constitutes a knowledge-based license requirement but also what constitutes a violation.

The EAR describes the word "knowledge" as including such variants as "know," "reason to know," or "reason to believe." Therefore, all the above terms ostensibly are interchangeable with the word "knowledge." The EAR defines "knowledge" as follows (emphasis added):

> Knowledge of a circumstance (the term may be a variant, such as "know," "reason to know," or "reason to believe") . . . includes not only positive knowledge that the circumstance exists or is substantially certain to occur, *but also an awareness of a high probability of its existence or future occurrence*. Such awareness is inferred from evidence of the conscious disregard of facts known to a person and is also inferred from a person's willful avoidance of facts. This definition does not apply to Part 760 of the EAR (Restrictive Trade Practices or Boycotts). (italics added)[14]

Awareness of a high probability of an existing circumstance is not a new criminal standard for imputing knowledge to a defendant. The government may use this standard to prove that a defendant had knowledge of a circumstance when he is claiming ignorance of the circumstances, and the government has material evidence to the contrary.[15] Most federal circuit courts include this standard in their jury instruction for "deliberate ignorance." The Federal Jury Practice and Instructions, for example, has a "deliberate ignorance" instruction. That instruction provides, *inter alia*, that

> No one can avoid responsibility for a crime by deliberately ignoring what is obvious. . . . [A] defendant's knowledge of a

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[14] 15 C.F.R. § 772.

[15] United States v. McAllister, 747 F.2d 1273, 1275 (9th Cir. 1984), *cert. denied*, 474 U.S. 829 (1985).

> particular fact may be inferred from a deliberate or intentional ignorance or, blindness to the existence of that fact.
>
> One justification for such a standard is that . . . one "knows" facts of which he is less than absolutely certain. To act "knowingly," therefore, is not necessarily to act only with positive knowledge, but also to act with an awareness of the high probability of the existence of the fact in question. When such an awareness is present, "positive" knowledge is not required.[16]

However, the EAR definition of knowledge goes beyond the "deliberate ignorance" instruction's standard of "knowledge." It also encompasses a situation where an exporter is aware of a high probability of a "future occurrence" of a circumstance. This, then, imposes upon the exporter the responsibility to predict a future event in cases where, with the benefit of hindsight, one could say that there was a high probability that such an event would occur.

Unfortunately, there is no one fool-proof way to prevent a prosecution for violations of the EAR. If the government can convince a federal magistrate that it has reasonable cause to believe that a violation has occurred or is about to occur, a search warrant will be issued and executed. The agony that such an event can cause in and of itself is to be avoided. The design and implementation of a competent compliance program is, as it always has been, the best way to impose regulatory discipline in an exporting environment.

8.1.9 Possession

The EAR states:

> (f) Possession with intent to export illegally. No person may possess items controlled for national security or foreign policy reasons under sections 5 or 6 of the EAA: (1) with intent to export such items in violation of the EAA, the EAR, or any order, license or authorization issued thereunder, or (2) with knowledge or reason to believe that the items would be so exported.[17]

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[16] United States v. Jewell, 532 F. 2d 697, 700 (9th Cir.), *cert. denied*, 426 U.S. 951 (1976).

[17] 15 C.F.R. § 764.2(f).

The use of the disjunctive "or" preceding subsection (2) of this section, taken literally, would mean that mere possession of any items controlled for national security or foreign policy purposes with knowledge or reason to believe that the items "would be so exported" constitutes a violation. In this regard, there is no change from the rule in former 15 C.F.R. § 787A.4(b). One naturally assumes that "so exported" refers to the preceding clause: "with intent to export such items in violation. . . ." If we assume for these purposes that an individual in possession knew or had reason to believe that items were going to be illegally exported, is this any different from acting with knowledge of a violation?[18] What is the difference between "store" and "possess"? What duty of inquiry is imposed on individuals in the chain of possession of any item? How are they supposed to know whether a given item is controlled for national security or foreign policy purposes unless they are substantively involved in the transaction itself?

8.2 INTENTIONAL VIOLATIONS

There are two types of sanctions under the EAR: criminal and administrative (or civil). These sanctions are described in EAA sections 11, 11A, 11B, 11C, the Nuclear Proliferation Prevention Act of 1994, and 15 C.F.R. § 764.

8.2.1 Criminal Sanctions

Intentional violations of the EAA or the EAR are dealt with severely. If criminal intent is found to have given rise to the violations (a finding made by a judge or jury in a federal district court), the defendant can be sent to prison or fined, or both. There are several categories of criminal activity in relation to the Act covered by the EAR. The first deals with knowing violations of the Act, the EAR, or any order or license issued thereunder. Persons knowingly violating these proscriptions may be fined up to the greater of five times the value of the exports involved or $50,000, or sent to prison for up to five years, or both.[19]

The second deals with unlawful exports of commodities, software, or technology to or for the benefit of any controlled

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[18] Described by 15 C.F.R. § 764.2(e).

[19] 15 C.F.R. § 764.3(b)(1).

country (for national security reasons) or to any country to which exports are controlled for foreign policy reasons. Persons willfully exporting anything to any destination contrary to the EAA, the EAR, or any order or license thereunder, knowing that such exports are to be used by or for the benefit of such countries, face fines up to the greater of five times the value of such exports or $1,000,000. Individual violators face a $250,000 fine, ten years in prison, or both.[20] Several categories of criminal activity were added to the EAA in 1988. They include the failure by an exporter to report to the Secretary of Defense that a particular good or technology was being used for military or intelligence-gathering purposes, contrary to the terms of the export license,[21] as well as the unlicensed export of any item contrary to controls imposed by sections 5 or 6 of the EAA or the evasion of such controls.[22] Since November 5, 1990, a U.S. or a foreign person knowingly violating controls on Category I missile items is to be denied for not less than two years all licenses for EAA-controlled items and a knowing violation involving Category II missile items results in denial for two years of licenses for items controlled for missile purposes.[23] Category I consists of missiles and missile subsystems. Category II is other missile-related items. Both categories are split between the State Munitions List and the Commerce Control List. A foreign person is also denied imports into the United States if that person's actions contributed substantially to a missile capability. These sanctions may be waived only for a sole source supplier of a product or service essential to U.S. national security.

Since December 4, 1991, any foreign person knowingly and materially contributing to a chemical or biological weapon capability in a country designated by the President, including countries subject to a terrorism determination,[24] through export from the United States of any item subject to U.S. jurisdiction under the EAA is, for at least 12 months, to be denied U.S. Government contracts and imports into the United States.[25]

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[20] 15 C.F.R. § 764.3(b)(2)(i).
[21] 15 C.F.R. § 764.3(b)(2)(ii).
[22] 15 C.F.R. § 764.3(b)(2)(iii), (iv).
[23] EAA § 11B(a)(1)(B).
[24] See Chapter 4, section 4.1.1 *supra*.
[25] EAA § 11C(a)(1)(A).

Since April 30, 1994, pursuant to the Nuclear Proliferation Prevention Act (NPPA), no foreign or United States person knowingly and materially contributing to a nuclear capability through the export from the United States or any other country of a nuclear referral list item[26] may participate in U.S. Government procurement activities for at least 12 months.[27]

There is an additional category of criminal activity mentioned in the EAR, dealing with violations of the False Statements Act. This law, which is found in the federal criminal code, covers all sorts of activities and is not restricted in its application to the Export Administration Act. It simply provides that the submission of any false or misleading information or the concealment of material facts (in this case, in connection with license applications, boycott reports, export clearance documents, etc.) is punishable by a fine of up to $10,000 or by imprisonment of up to five years, or both.[28] It is important to note that criminal liability may arise under the EAR without actually making an unlawful export; for example, routine and repeated failures to report boycott requests could demonstrate the culpable intent required to draw a criminal prosecution.[29] Moreover, administrative sanctions may be imposed in any case, in addition to criminal penalties.

It should be noted at this point that the Department of Commerce does not prosecute its criminal cases. Once the Office of Export Enforcement determines that there is a possible criminal violation, the case is referred to the Department of Justice, and from there to the U.S. Attorney in the city or region most appropriate to the case. The exporter involved in such a case faces the full resources of the Federal Bureau of Investigation and the Department of Justice, as well as the Office of Export Enforcement and the Customs Service.

EAR sanctions revisions[30] are more evident than EAR violations revisions[31] and, arguably, more far-reaching as well. As with

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[26] Coded NP on the Commerce Control List.

[27] Also see section 8.6 for a discussion of the extraterritorial reach of EAA sections 11A, B, and C and of the NPPA.

[28] 18 U.S.C. § 1001.

[29] 15 C.F.R. § 764.3(b)(3). Other types of potential liability of non-exporters are discussed in section 8.5 *infra*.

[30] 15 C.F.R. § 764.3.

[31] 15 C.F.R. § 764.2.

the previous version,[32] sanctions include criminal and administrative sanctions; but in the revised EAR the order in which they are stated is inverted.

The revised EAR added the following provision:

> In the event that any part of the EAR is not under the authority of the EAA, sanctions shall be limited to those provided for by such other authority or by 18 U.S.C. 3571 . . .[33]

The EAA expired in August 1994 and has not been reenacted since then. Therefore, the EAR is, at present, under "other authority." That "other authority" is IEEPA.[34] IEEPA provides for a civil penalty not to exceed $10,000 and criminal penalties of not more than $50,000 or imprisonment for not more than ten years.[35] The higher fines specified in § 764.3(b)(2) are, therefore, of questionable legality. On the other hand, the 18 U.S.C. § 3571 alternative establishes a criminal fine that is the greater of the amount provided by the statute that was violated or an amount not more than $500,000 for an organization.

Violations of the EAA and the EAR[36] may also constitute a criminal conspiracy,[37] a violation of the False Statements Act,[38] mail and wire fraud,[39] or money laundering.[40] Its predecessor[41] cited only the False Statements Act.

A cross-debarment provision notes that persons indicted or convicted of violations of the EAA or denied export privileges by BXA may be denied licenses or approvals under the Arms Export Control Act and that the right of any person to contract with the U.S. Government may be suspended based on export control violations.[42]

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[32] 15 C.F.R. § 787A.1.
[33] Footnote 2 to 15 C.F.R. § 764.3(b).
[34] 50 U.S.C. § 1701 ff.
[35] 50 U.S.C. § 1705.
[36] 15 C.F.R. § 764.3(b)(3).
[37] 18 U.S.C. § 371.
[38] 18 U.S.C. § 1001.
[39] 18 U.S.C. §§ 1341, 1343, and 1346.
[40] 18 U.S.C. §§ 1956 and 1957.
[41] 15 C.F.R. § 787A.1(a)(2).
[42] 15 C.F.R. § 764.3(c)(2)(ii).

8.2.2 Administrative Sanctions

The EAR clearly states the essential premise of administrative enforcement powers:

> Administrative. Violations of the EAA, the EAR, or any order, license or authorization issued thereunder are subject to the administrative sanctions set forth in this subsection, and to any other liability, sanction or penalty available under law. The protective administrative measures that are described in § 764.6 of this part are distinct from administrative sanctions.[43]

This statement expresses BXA's position that "protective administrative measures," such as a temporary denial order and the like, may be imposed without procedural safeguards.[44] In practical terms, this position is the same as BXA has taken historically; but it does seek to address some concerns regarding due process that have been raised by respondents in administrative proceedings in the past few years. On the other hand, the wording "any other liability, sanction, or penalty available under law" did appear in the old EAR.

Administrative sanctions authorized in the revised EAR[45] are more detailed than they were previously:[46]

> The payment of any civil penalty may be made a condition, for a period not exceeding one year ... to the granting, restoration, or continuing validity of any export license, License Exception, permission, or privilege ...[47]

This language is taken from EAA section 11(d), except that 11(d) omits "License Exception."[48]

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[43] 15 C.F.R. § 764.3(a).

[44] 15 C.F.R. § 764.6(c) states that BXA may, in accordance with § 766.24 of the EAR, issue an order temporarily denying export privileges and § 766.24(a) states that the procedures in this section (755) apply to temporary denial orders issued on or after July 12, 1985.

[45] 15 C.F.R. § 764.3(a).

[46] 15 C.F.R. § 787A.2.

[47] 15 C.F.R. § 764.3(a)(1)(ii); the provision did not appear in 15 C.F.R. § 787A.2.

[48] See the discussion of "export privileges" in section 8.1.1 *supra*.

The revised EAR then spells out a broadened sweep of BXA's authority to deny export privileges.[49] For example, it expands the previous concept of denial of export privileges "conferred under the Export Administration Act"[50] by barring an individual from engaging in export-related transactions involving items "subject to the EAR" or from having access to such items. This is significant, because EAA section 11(h)(1) uses the expression "apply for or use any export license under this Act," thereby indicating that export privileges that may be denied are limited to those that require a license. The revised EAR also describes a standard denial order.[51] The revised EAR also broadens the reach of the authority to exclude persons from export practice,[52] by omitting earlier language, the revised EAR curiously fails to specify that an individual excluded from practice from BXA must be found to have violated the EAR or the EEA.[53] Although it is inconceivable that BXA would arbitrarily bar an attorney from representing a license applicant or a respondent before BXA (and BXA in fact interprets this subsection as requiring a finding of a violation), such an improbable result is not precluded by this language. EAR does state:

> Violations of the EAA, the EAR, or any order, license, or authorization issued thereunder are subject to the administrative sanctions set forth in this section . . .[54]

Exclusion from practice is one of those sanctions, but is not limited on its face to violators. BXA should revise 15 C.F.R. § 764.3(a)(3) to avoid further confusion on this point.

8.3 INADVERTENT VIOLATIONS

Inadvertent violations generally will attract only administrative penalties, which are administered by the Department of Commerce alone. Administrative sanctions assume one or more of four forms: denial of export privileges; exclusion from practice before the Bureau

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[49] 15 C.F.R. § 764.3(a)(2).
[50] 15 C.F.R. § 787A.1(b)(1).
[51] 15 C.F.R. § 764 Supplement 1.
[52] 15 C.F.R. § 764.3(a)(3).
[53] 15 C.F.R. § 787A.1(b)(2).
[54] The first sentence of 15 C.F.R. § 764.3(a).

of Export Administration; civil penalties (fines); and seizure of the commodities or technical data involved in the case. Administrative proceedings under the EAR[55] are discussed in detail below. It is essential to note, however, that the doctrine of strict liability applies to even the most innocent participant in an export. This was established in *Iran Air v. Kugelman*,[56] a case where the petitioner was fined $100,000 by the Bureau of Export Administration for having unwittingly transported items to Iran that required a validated export license. Although the case was remanded for reconsideration of the magnitude of the penalty, the court held (citing the text) that the doctrine of strict liability did attach, and the government was not required to show volitional conduct on petitioner's part.

8.4 OPERATION EXODUS

"Operation EXODUS" was the code name given to a stepped-up export control enforcement program by the Customs Service that began in October 1981. "Operation EXODUS" essentially entailed the inspection of export shipments at various U.S. ports by Customs agents to determine whether illegal shipments were about to be made. Although no longer called "Operation EXODUS," Customs continues to have, and to exercise, this authority.

If inspections of documents reveal an irregularity, the shipment will be detained and the Bureau of Export Administration will be contacted by Customs to determine whether there has been a violation and, if so, how serious it is. Under existing guidelines, the exporter of record should be advised of the detention simultaneously; however, in practice, this does not always occur. As a consequence, EAA section 12(a)(2)(B) was added to provide that no shipment eligible for export under a general license may be detained for more than 20 days. Even where there is an agency disagreement over the status of the shipment, the detention must either be released or converted into a seizure within the 20-day period. Once a seizure has been made, the exporter at least has access to judicial process to deal with it (see discussion below), whereas in the case of a detention, the shipment remains in limbo.

Where Customs determines that a detained shipment may entail a serious violation, a formal investigation may follow, the shipment

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[55] 15 C.F.R. § 766.

[56] 996 F.2d 1253 (D.C. Cir. 1993).

may be seized, and the case may be referred to the U.S. Attorney for possible criminal prosecution. This has occurred in about one out of every three detentions.

Even if the shipment had already left the United States when Customs determines that it should be detained, Customs can contact the carrier and require the shipment to be returned to the United States for detention or seizure. The carrier must obey such directions.[57] Seizures will result in the immediate commencement of a civil forfeiture action.[58] In all seizure cases, the exporter will be afforded an opportunity to seek release of the shipment through administrative channels. Whether to pursue judicial or administrative relief should be decided in light of the circumstances of the specific case.

Customs agents experience difficulties in differentiating between non-substantive and substantive documentation errors. This may result in protracted detentions of shipments. Therefore, it is wise for the exporter to review all export documents for accuracy and to insist that freight forwarders and other agents do the same.

The most common clerical errors include: inadequate or inaccurate descriptions of commodities; incorrect ECCN numbers; and follow-up shipments permissible under a previously issued license, but which are shown as eligible for a License Exception or for "no license required."

8.5 VIOLATIONS OF U.S. CONTROLS

Fundamentally, any act or omission which contravenes U.S. controls as described in the EAA, the EAR, or any order or license issued under the EAA or the EAR, is a violation. As shown by the *Iran Air* case,[59] strict liability arises and unknowing violators are subject to administrative action. There also can be liability for causing, aiding, or abetting a violation by another person. Also embraced within a violation is the solicitation of a violation, an attempted violation, acting with the knowledge of a violation, possession of goods or technical data with an intent to export illegally, or a conspiracy to violate any part of the EAA or the EAR. Finally,

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[57] 15 C.F.R. § 732.6(c).

[58] Under the general authority of 22 U.S.C. § 401 and 19 U.S.C. § 1607.

[59] See section 8.3 *supra*.

the participation by any person in a transaction covered by the EAA or the EAR, knowing that such transaction is in violation of U.S. controls, constitutes a violation.

A separate provision of the EAR discusses liability for misrepresentation and for concealment of facts. This provision covers just about all conceivable types of representations or certifications made to the Bureau of Export Administration in connection with export activities.

In addition to these general types of conduct, several specific areas of activity are singled out for special attention:

- Export, diversion, reexport, or transshipment: (a) in violation of any terms, provisions, or conditions of any export control document; (b) in contradiction to any prior representation; (c) in contravention of a prohibition against such a transaction; or (d) in violation of any provision of the EAA, the EAR, or any order or license issued thereunder.
- Failure to comply with any reporting requirements.
- Failure to answer interrogatories, respond to requests for admissions, or produce documents sought by the Commerce Department during an investigation.
- Allowing someone else to effect an export outside of the licensee's control (otherwise known as the doctrine of strict accountability).
- Unauthorized use or alteration of export control documents.
- Trafficking in or advertising the availability of export control documents.
- Acting as agent for an undisclosed principal or as a fictitious agent or principal.
- Dealing with persons subject to denial orders in relation to a transaction under the jurisdiction of the EAA.

8.5.1 Vicarious Liability for Employee

Under former 15 C.F.R. § 787A.9, the person to whom a license was issued was held strictly accountable for the use of the license. While former 15 C.F.R. § 787A.9 has no current analog, principles of agency law arrive at a similar conclusion. Therefore, if an employee violates the law in regard to a license issued to the company, the company is responsible.

It is clear that most of the sanctions for violations specifically set forth in the EAR are assessed against the company as a whole, although caused by the unlawful act of one of its employees. In other instances, however, such as those where liability depends upon volitional conduct, there would have to be proof that the company knew that its action was illegal.

8.5.2 Vicarious Liability for Company

The liability of a U.S. exporter for the acts of any other party, whether domestic or foreign, depends on the complicity of the U.S. exporter. If a foreign consignee, for example, reexports a commodity in contravention of the EAR, the U.S. exporter would not be held liable unless it could be shown that the exporter had been involved in that conduct. It should be remembered, however, that the U.S. exporter has a continuing obligation of disclosure to BXA, the neglect of which could result in liability. Liability also can arise if the U.S. exporter participates in a transaction knowing or having reason to know that a violation of the EAA or the EAR is about to occur.[60] It may be difficult for a U.S. exporter, bank, or freight forwarder to convince BXA that it did not have knowledge or reason to know of an imminent violation by a foreign consignee where the circumstances, in retrospect, were suspicious. In other words, the U.S. party cannot simply turn its head away and plead ignorance in the face of facts when common sense dictates other conduct. This would also apply to a non-exporting U.S. party who is exposed to liability if he participates in a transaction that ultimately is shown to violate the EAA or the EAR.[61]

8.5.3 Being Put on Notice

BXA has published a helpful list of "red flags" to assist U.S. manufacturers and distributors in spotting possible, actual, or potential violations.[62] A company engaged in the production or marketing of "high tech" products or other products that are subject

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[60] See 15 C.F.R. § 736.2(b)(10).

[61] For a full discussion of this aspect, see Sexton, *Liability of Non Exporters Under the U.S. Export Laws*, 24 DM Lawyer 1029 (1990).

[62] 15 C.F.R. § 732 Supplement 3.

to stringent controls should be on the lookout for the following kinds of situations:

Where foreign orders are concerned:

- Reluctance of customer or its agent to provide end-user or end-use information.
- Performance or design requirements incompatible with resources or environment of the destination country or with the buyer's line of business.
- Stated end-use incompatible with customary or known applications for equipment being purchased, or with purchaser's line of business.
- Use of an intermediary whose location or business is incompatible with the purported end-user's business or location.

Where domestic or foreign orders are concerned:

- Use of freight forwarders as ultimate consignees.
- Evasive responses to any questions regarding end-use, end-user, or destination.
- Customer willingness to pay cash for a large value item or order.
- Little or no customer business background information available.
- Lack of customer familiarity with commodity's performance, design characteristics, or uses.
- Customer or agent's refusal to accept installation or service contracts normally included in similar transactions.
- Ill-defined delivery dates or delivery locations inconsistent with the type of commodity or usual practices.
- Packaging or packing requirements inconsistent with shipping mode or declared destination.

8.5.4 Reporting Obligations

A distinction must be made between the person who is involved in a transaction in which a violation is committed and the person who is not.

Obtaining a license and, indeed, the participation in just about all export transactions, entails the use of documents requiring the exporter to make certain representations to the government. Obviously, if the exporter makes misrepresentations or fails to disclose

material facts to the government in relation to these transactions, liability arises.

The EAR also provides, however, that the duty of disclosure does not stop when the proposed export is licensed. All persons within the purview of the EAR have an affirmative duty at all times to notify the government in writing of any change of material fact or intention from that previously represented. As stated in the EAR, their duty arises when "reasonably prudent person" has cause to believe that a change has occurred or may occur in the future.[63] An exporter's concealment or cover-up of a violation by a consignee, therefore, is every bit as culpable as a direct violation of the law by the exporter itself. The point to be made is that any person involved in the transaction, while perhaps not directly participating in a violation, could be viewed as an accessory or aider and abettor in relation to the violation, and might incur significant exposure.

In relation to direct violations by the exporter, there is the Fifth Amendment to be taken into account. The Fifth Amendment to the U.S. Constitution forbids compelling any person to incriminate himself. Accordingly, the requirement that a person report violations must be considered in light of this constitutional limitation. But the violator must recognize that evidence of his violation may well be obtainable from sources other than his own lips and conscience. The point remains, however, that every criminal defendant has the absolute right to require the government to carry independently the burden of proof of his guilt; the defendant cannot be compelled to give evidence against himself.

For the person who is uninvolved in a transaction, but who becomes aware that a violation has occurred or is about to occur, the question is much more difficult. For example, is there a duty of disclosure by a person who learns that a competitor may be violating the law? The answer is "no." The person in question clearly does not have access to all of the facts available to the competitor. Moreover, if a person reports suspicions to the government and the competitor's buyer cancels the order as a result of that action, that person had better be absolutely correct. An erroneous report of this sort which causes a pecuniary loss to the competitor could result in substantial liability to the reporting person; libel, slander, and interference with advantageous business relations are but a sampling of the theories of

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[63] Former 15 C.F.R. § 787A.5(b)(3).

liability that could attach. Anonymity in such circumstances could be extremely tenuous, especially considering the impact of the Freedom of Information Act. The easy answer in this example is not to take the risk. This course of action, however, undermines the need for the export community to police itself effectively. Unless such self-regulation is achieved, much more onerous government controls than already exist could be imposed in the future.

For an even more difficult situation, consider the plight of the mid-level employee of an export firm whose suspicions are aroused about the legality of a superiors' conduct. The employee who says nothing, either to superiors or to the government, risks personal culpability. But taking action risks the loss of the employee's job — whether that suspicion is right or wrong. If an employee is right and the boss is prosecuted, the company (especially a small one) could be put out of business; and, the employee who is wrong is certainly out of a job. A preferred course of action might be to raise this matter in writing in a non-confrontational manner with the employee's superiors, in effect simply suggesting that certain legal requirements may have been overlooked. If the superiors have been acting simply out of ignorance, they might appreciate having the matter brought to their attention and the situation quickly could become a "non-problem." If they have other intentions, though, the employee may simply have escaped criminal liability — perhaps small comfort for someone who becomes jobless overnight.[64]

8.5.5 Violation Charged

If a person is charged by the government with a violation of the EAR, the first step would be to consult an attorney. The choice of counsel is particularly important because the law in this area is highly specialized and requires an understanding of both the substance and procedure embodied in the EAA and the EAR. Acquiring a specialist's services is also important because a criminal charge could be forthcoming through prosecution by the Department of Justice. Accordingly, the exporter first should select counsel familiar with the EAR; that counsel, in turn, can associate criminal defense counsel if

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[64] These quandaries arise in many contexts other than the one presented here. Antitrust, drug regulation, unfair trade practices, and "garden variety" criminal laws all have the potential for the same predicament. None of them is easily answered.

necessary. Until a person has had an opportunity to retain an attorney, it is highly inadvisable to discuss a charge with any government official or any person other than counsel. If there is possible criminal liability involved, preservation of the right against self-incrimination is a primary consideration. The only person to whom a person can communicate in absolute confidence is his attorney.[65]

8.5.5.1 Administrative Proceedings

BXA has tightened procedural rules in part 766, in large part to address shortcomings revealed in administrative enforcement proceedings that had been conducted under the former rule, 15 C.F.R. § 788A. In contrast to 15 C.F.R. § 764, however, fewer of the changes in 15 C.F.R. § 766 are substantive or substantial.

The sanctions found in former 15 C.F.R. § 788A.3 have been expanded and incorporated into 15 C.F.R. § 764.3, as discussed above, and the definitions enumerated in 15 C.F.R. § 766.2 reflect most of the procedural refinements incorporated into this new rule.

In cases where a respondent fails to respond to a charging letter, 15 C.F.R. § 766.7 sets forth procedures that would be more protective of a respondent's procedural rights than the former rule, 15 C.F.R. § 788A.8, in that the administrative law judge's proposed order must be reviewed by the Under Secretary. However, unlike the former rule, 15 C.F.R. § 766.7 expressly provides that a default by a respondent constitutes a waiver of his right to contest the charges.

An entirely new procedure authorizing summary decisions is set forth in 15 C.F.R. § 766.8. As is the case with its counterpart, Rule 56 of the Federal Rules of Civil Procedure, this rule allows the administrative law judge to summarily dispose of some or all of the issues in a matter as to which there is no genuine issue of material facts, and in which the moving party is entitled to summary judgment as a matter of law.

8.5.5.2 Form of Charge

In criminal cases, the individual may be indicted by a federal grand jury or charged by the filing of an information by the U.S.

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[65] There is, of course, a similar privilege between spouses, patients and physicians, and confessors and clergy; we assume that these people are outside of the circle of persons whose counsel likely would be sought in these cases.

Attorney. These steps may precede any actual knowledge by the person involved of imminent prosecution. They would normally be followed by an arrest.

In administrative litigation, which is much more common than criminal prosecution, proceedings are commenced by the issuance of a charging letter.[66] The charging letter typically states the essential facts of the alleged violation and invites the respondent to defend him or her self.

8.5.5.3 Publicizing Administrative Proceedings

These proceedings are not publicized in the normal manner. The original pleadings are available for inspection only under Freedom of Information rules. All decisions on appeal and any final orders providing for denial, suspension, or revocation of export licensing privileges are published in the *Federal Register*.[67]

8.5.5.4 Opportunity to Defend

The regulations provide specifically that all persons charged with violations shall have the right to be represented by counsel and to file responses to the charges. All of the methods of discovery available to civil litigants in federal courts are made available, including written interrogatories, oral depositions, and (where necessary to protect sensitive information) protective orders.

8.5.5.5 Settlement

The EAR provides that the government and respondent may submit a consent proposal to the presiding official at any time after the service of a charging letter, so long as the proposal comes before the decision. While it would appear that any reasonable settlement should be acceptable to the presiding officer, there are no guarantees of that result.[68]

It should be noted also that cases may be settled prior to the service of a charging letter. Instances may occur where BXA investigates an exporter and finds what it believes to be a violation of the

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[66] See 15 C.F.R. § 766.3(a).
[67] See 15 C.F.R. § 766.20(c).
[68] See 15 C.F.R. § 766.18(b).

EAR. If, after conferring with the party involved and furnishing a proposed charging letter and a letter of intent to charge, the government persuades the party to change its position, the matter may be settled even before the official issuance of a charging letter. In such a case, the file (which is available for public inspection) will contain the letter of intent to charge, the proposed charging letter, and the final consent order. If the parties cannot settle the dispute, a formal hearing is conducted and a disposition of the charge(s) made.

8.5.5.6 Discovery

In an administrative proceeding, discovery is far-reaching and available equally to both sides, at least in theory. As indicated earlier, the same techniques available to litigants in civil actions are available to the parties to an administrative compliance proceeding. These techniques include the right to demand the production of documents for inspection by the other side.

The principal limitation on the right to discovery is found in provisions governing the right of access to sensitive material. Since, in almost every instance, it will be the government claiming that access should be restricted, the practical effect of this limitation is felt by the respondent in an administrative compliance proceeding. There are provisions, however, whereby the hearing officer may order partial or full disclosure under varying kinds of protective orders in order to avert prejudice to the respondent.[69]

The following in camera proceeding protection in former 15 C.F.R. § 788A.11(d) has been omitted in the revised EAR:

> . . . the Department may present information and documents in camera in the presence of the respondent or respondent's counsel.

8.5.5.7 Limitations on Defense

In any criminal proceeding, a defendant should have the opportunity to prove that he or she did not commit the act alleged and/or that he or she lacked criminal intent. One of the obvious issues in the context of export control prosecutions is whether the article exported was subject to license requirements under the EAA. It is here that the views of authorities diverge.

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[69] See 15 C.F.R. § 766.11.

Several defendants in export control cases have attempted to assert as a defense that the exported item did not, in fact, require a license. Most courts considering this question have ruled that whether a particular export requires a license is a decision best left to the executive branch of the government, and have not allowed defendants to challenge that administrative decision.[70] Other defendants, while conceding that the classification of a particular commodity is a non-justiciable question, have asserted that the commodities in their cases were not, in fact, controlled. The opportunity to offer evidence that an exported item was not, in fact, subject to a license requirement appeared in the *Edler* case to be a fundamental right.[71] But the *Spawr* decision held that the defendant could not challenge the finding of the Commerce Department on that issue.[72] In *Fiber Materials, Inc.*,[73] the government argued that the exporter should have sought a classification of his product from the Commerce Department before shipping without applying for a license, whereas the defendants argued that, in their view, the product, without doubt, did not require a license. This 1995 case is still not resolved as of the writing.

Finally, in *Bernstein*,[74] the defendant challenged the government's regulation over encryption exports on constitutional grounds. The district court found a source code to be protected speech under the First Amendment and held that the regulation over encryption constituted an impermissible prior restraint.[75] The district court's holding was affirmed by the Ninth Circuit,[76] but will be reheard by the original appellate panel on remand from the U.S. Supreme Court. Meanwhile, the controls remain in effect, although they have

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[70] See, *e.g.*, U.S. v. Moller-Butcher, 560 F. Supp. 550 (D. Mass. 1983); and U.S. v. Mandel, 914 F.2d 1215 (9th Cir. 1990) (reversing trial court's decision to permit defendant to offer evidence of foreign availability).

[71] See U.S. v. Edler Industries, Inc., 579 F.2d 516 (9th Cir. 1978) (case arose under the Arms Export Control Act).

[72] See U.S. v. Spawr Optical Research, Inc., 864 F.2d 1467 (9th Cir. 1988) (Judge Pregerson dissenting).

[73] United States v. Lachman, 48 F.3d 586 (1st Cir. 1995).

[74] Bernstein v. United States Department of Justice, 176 F.3d 1132 (9th Cir. 1999).

[75] See *id.* at 1136.

[76] See *id.* at 1147.

been modified.[77] Irrespective of the outcome of *Bernstein*, the case undoubtedly will have broad implications on export control policy.

Against this backdrop, it is difficult to draw any useful conclusions. One generalization that can be made, however, is that an exporter who unsuccessfully applies for a license and then ships anyhow will have difficulty in establishing that he did not have criminal intent. This was the factual context of *Spawr*. But it was also the factual context of *Edler*, where the salient concern of the court appeared to be with balancing the broad sweep of ITAR's definition of "technical data" with First Amendment rights associated with the free exchange of scientific information. An exporter's failure to seek such guidance or to apply for the appropriate export license may tend to show lack of criminal intent, but reliance on such a proposition would be hazardous at best.

In light of the above, an exporter might be inclined to seek a classification from the government or to apply for a license even when convinced that a license is not required. But this is not practical for general applicability, because the government is not staffed to respond to classification requests or license applications for everything that moves in the export trade. However, where the classification of the product to be exported is in substantial doubt, it is desirable either to request the government for a classification or apply for a license.

A brief observation at this point concerning the difference between the EAR and the ITAR is appropriate, and may ultimately prove useful in reconciling apparently conflicting or inconsistent judicial positions in these cases. Even a cursory comparison between the EAR and the ITAR will reveal that where the EAR is fastidiously detailed in parsing those commodities and technical data that are subject to export controls, the ITAR is very broad and general in its sweep. The two regulatory schemes are quite different in several important respects. For one, there are far fewer exceptions from license requirements under the ITAR. A license is required for exports to all destinations of "defense articles" or "defense services" (a term that includes furnishing "technical data") unless there is an express exemption or exception for that type of transaction.[78] For another, there are gross definitional differences between the two regimes, particularly in terms of definitions of "technical data,"

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[77] See Chapter 5.

[78] Exemptions for Canada were recently narrowed. See Chapter 2.

"public domain," and similar expressions. These distinctions are best illustrated by the only court case to deal with the ITAR "public domain" and "agency release" exemptions. In *United States v. Posey*,[79] the courts were confronted with a prosecution of a defendant who had exported materials that were obtainable through the Freedom of Information Act. After a former Department of Defense official testified that the Defense Department considered materials released under the Freedom of Information Act to be in the "public domain" (864 F.2d at 1494), the trial court met with counsel in chambers and indicated that it had "real problems" with the charge that the defendant had violated the ITAR by exporting publicly-available materials. The government next moved to dismiss the count in question, and the motion was granted. Moreover, the trial court properly instructed the jury that it could not convict a defendant if the items in question were found to be in the public domain.[80] In *United States v. Hoffman*,[81] the defendant was charged with violations of the ITAR for having exported without license "plume contamination" software used in the space program for more than 20 years. When the Strategic Defense Initiative program went into high gear in the early 1980s, a government agency imposed export controls on later versions of the exported programs and, in the process, attempted to control the earlier versions of the software that, arguably, were within both the "public domain" and "agency release" exemptions of the ITAR. The issues framed in *Spawr Optical*, *Edler*, *Mandel* and *Posey* were all addressed in various pretrial proceedings, and the trial court permitted the defense to offer proof that the "public domain" exemption from licensing requirements was available to him. This was difficult to prove because the ITAR definition of "public domain" is limited to ". . . information which is published and which is generally accessible or available to the public."[82] The court did not allow the defendant to offer proof of the applicability of the "agency release" exemption. The government contended that recontrol of this software was within the exclusive province of the executive branch and the trial court convicted Hoffman. The case is being appealed.

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[79] 864 F.2d 1487 (9th Cir. 1989).

[80] 864 F.2d 1491-1492.

[81] C.D. Cal. No. CR 90-870-AWT.

[82] 22 C.F.R. § 120.11; see also analysis of "public domain" in Appendix 2-1.

In the view of the defense, the seminal question in this case was whether the exported software had been previously disseminated abroad. If the government recontrols a commodity, importers cannot obtain additional copies of that commodity. Recontrol of software deprives the previous importer of nothing, however. He cannot be stopped from retransmitting the knowledge previously transferred and, moreover, software is easily copied.

The government generally recognizes the futility of controlling previously transferred technical data, even if the previous transfer was not to the public. The ITAR specifically exempts from license requirements:

> Copies of technical data, including classified information, previously authorized for export to the same recipient. Revised copies of such technical data are also exempt, if they pertain to the identical defense article, and if the revisions are solely editorial and do not add to the content of technology previously exported or authorized for export to the same recipient.[83]

This exemption logically permits repetitive transfers without restrictions concerning the recipient if the original approval was for release to the public, *i.e.*, without restrictions on further dissemination.

A similar Commerce regulation in effect at the time explicitly excluded from control previously exported software even if the software was neither in the public domain nor approved for release to the public:

> This [does] not control "software" initially exported to a proscribed destination prior to January 1, 1984, provided that:
>
> (a) the "software" is identical to and in the same language form [source or object] as initially exported, allowing minor updates for the correction of errors that do not modify the initially exported functions;
> (b) The accompanying documentation does not exceed the level of the initial export; and
> (c) The "software" is exported to the same proscribed destination as the initial export (15 CFR 779A. Supp. No. 3, n 2).

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[83] 22 C.F.R. § 125.4(b)(4).

The government's so far successful attempt to recontrol software, as in the *Hoffman* case, has raised serious *ex post facto* issues that any defendant should be permitted to challenge. In a recent case, *Collins v. Youngblood*,[84] the U.S. Supreme Court held that the Constitution's *ex post facto* clause prohibits retroactive alteration of the definition of crimes so as to render criminal what was formerly innocent conduct. Yet, in barring the defendant from raising the regulatory "agency release" exemption under the ITAR in this case, that was precisely what the government accomplished.

8.5.6 Appeal

An adverse compliance ruling may be appealed, although the scope of review on appeal is quite limited. Appeal from an adverse compliance ruling is taken directly to the Under Secretary of Commerce for Export Administration, and is not appealable further to any court. The grounds for appeal are strictly limited to four contentions: (1) that a necessary finding of fact is omitted, erroneous, or unsupported by substantial evidence of record; (2) that a necessary legal conclusion or finding is contrary to law; (3) that prejudicial procedural error occurred; or (4) that the decision or the extent of sanctions is abusive. There are no hearings *de novo* on appeal.[85]

8.5.7 Penalties

Penalties may take several different forms.

8.5.7.1 Denied Persons List

No activity, including the obtaining of any export control document, may be undertaken for the benefit of a person on the Denied Persons List, *i.e.*, which would enable that person to receive any commodities or technical data exported from the United States directly or through reexport.[86] If you know or suspect that such a person is related to another entity which then seeks to purchase the

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[84] 110 S. Ct. 2715, 111 L. Ed. 2d 30 (1990).

[85] See 15 C.F.R. § 766.21 and 15 C.F.R. § 756 for a full discussion on this matter.

[86] 15 C.F.R. § 774 Supplement 1(b).

commodities or technical data, you must so inform the Bureau of Export Administration before making such a sale.

Individuals often deal innocently with denied parties because they have relied upon the infrequent updates to the EAR published in loose-leaf form or upon various online services rather than upon the *Federal Register*.[87] The revised EAR makes the *Federal Register* the only reliable source for the business community. Since few businesses subscribe to the *Federal Register*, instead relying upon the loose-leaf form or online services for this information, the utility and reasonableness of this proposed revision is questionable and has been vigorously opposed by commentators. As a result, the new rules refer to two U.S. Government electronic bulletin boards, reliance upon which would entail less risk than referring only to loose-leaf lists.

The introduction of the Denied Persons List omits from the section on "Related persons" the following from the former EAR:

> . . . were not found to have violated the Act or Regulations, but . . . .[88]

This omission does not mean that related persons have been formally found to have violated anything; but it implies a presumption of guilt by association. On the other hand, the following addition to the EAR at least requires a finding of some relevance to a possible evasion:

> . . . The sole issues to be raised and ruled on in any [appeal by a person named as related to the respondent] are whether the person so named is related to the respondent and whether the order is justified in order to prevent evasion. . . .[89]

8.5.7.2 Temporary Denial Orders

BXA's entrenched long-standing position is that:

> The issuance or renewal of the temporary denial order shall be affirmed only if there is reason to *believe* that the temporary denial

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[87] 15 C.F.R. § 764 Supplement 2.
[88] 15 C.F.R. § 788A Supplement 1(a)(1).
[89] 15 C.F.R. § 766.23(c).

> order is required in the public interest to prevent an imminent violation . . . (emphasis added).[90]

Section 13(d) of the EAA, however, authorizes the imposition of a temporary denial order only (emphasis added):

> In any case in which it *is necessary*, in the public interest, to prevent an imminent violation . . .

Thus, "is" in the statute, unlike "believe" in the regulation, suggests that an external objective standard of proof is required.

8.5.7.3 Standard Denial Orders

The revised EAR sets forth, for the first time, a "standard" denial order.[91] This is presumably to provide a baseline for administrative law judges along the lines of the Federal Sentencing Guidelines. There is even an element of retroactivity:

> Denial orders issued prior to March 25, 1996, are to be construed, insofar as possible, as having the same scope and effect as the standard denial order.[92]

The standard denial order is tighter than previous guidance[93] in several respects. But less draconian orders are permissible.[94]

8.5.8 Voluntary Disclosure

Self-policing efforts among exporters are encouraged by a section of the EAR[95] providing that voluntary self-disclosure will be a mitigating factor in determining what administrative sanctions, if any, will be imposed by the Office of Export Enforcement. At the same time, this regulation makes clear that voluntary self-disclosure

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[90] 15 C.F.R. § 766.24(e)(5).

[91] 15 C.F.R. § 764 Supplement 1. An assertion that the standard denial order is authorized appears in 15 C.F.R. § 764.3(a)(2).

[92] 15 C.F.R. § 764 Supplement 1(a).

[93] 15 C.F.R. § 787A.12.

[94] 15 C.F.R. § 764.3(a)(2).

[95] Former 15 C.F.R. § 787A.15 was added to the EAR in 1989, now found at 15 C.F.R. § 764.5. An analogous provision, 22 C.F.R. § 127.12, was added to the ITAR on July 22, 1993 (58 Fed. Reg. 39,319). See section 8.7.9 *infra*.

mitigation is available only when disclosure is made prior to receipt of knowledge from another source and prior to commencement of an investigation by any government agency (including OEE) involving that information. Such self-disclosure does not guarantee that harsh sanctions will not be meted out. As stated in the rule:

> While voluntary self-disclosure is a mitigating factor in determining the administrative sanctions, if any, imposed by the Office of Export Enforcement, it is a factor that is considered together with all of the other factors in the case. The weight given to voluntary self-disclosure is solely within the discretion of the Office of Export Enforcement and it is possible that the mitigating effect of voluntary self-disclosure could be outweighed by aggravating factors. It is also possible that the transactions that are the subject of voluntary self-disclosure could be referred to the Justice Department for criminal prosecution. In such a case, the Office of Export Enforcement would notify the Justice Department of the fact of the voluntary self-disclosure, but the Justice Department is not required to give that fact any weight.[96]

The regulation then proceeds to set forth various requirements and procedures of voluntary self-disclosures, including rules regarding initial notification and the contents of disclosures, and then delineates possible results of an investigation following a disclosure. Those alternatives, as suggested above, run the gamut from no action to referral to Justice for prosecution, and they will be driven by the following factors:

- The extent to which the purpose of the control was undermined by the transaction in issue.
- Whether the transaction would have been authorized had proper application been made.
- The quantity and value in U.S. dollars of the commodities or technical data involved.
- Why the violation occurred, including whether the violation was inadvertent or intentional, the degree to which the person or firm responsible was familiar with the regulations, and whether the violator was subject to prior criminal or administrative action under the Export Administration Act.

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[96] 15 C.F.R. § 764.5(b)(4).

- Whether, as a result of the disclosure, the OEE was able to prevent any commodities or technical data illegally exported from reaching unauthorized persons or destinations.
- The degree of cooperation with the ensuing investigation.
- Whether the person or firm has instituted or improved an internal compliance program designed to avoid a similar violation in the future.

Because a voluntary disclosure by definition jettisons one's Fifth Amendment rights against self-incrimination, a party considering making such a disclosure should consult with counsel before doing so.

Two changes in this part of the revised rules[97] limit the efficacy of voluntary self-disclosures.

Under the former rule,[98] a disclosure was timely if the government had not already commenced an investigation on the basis of information received from another source and where such investigation is intended to determine whether the EAA or any regulation, license, order, or other authorization issued under the EAA has been violated.

The new rule[99] does not so limit such prior investigation. This could discourage a voluntary disclosure, since the government would be able to assert that a prior informal query negates any mitigating factor that could otherwise have resulted from the disclosure, even though the government had not concluded that the information which it had independently obtained constituted evidence of a violation.

The EAR requires that the initial notification be in writing and be sent to one of the listed addresses.[100] The old EAR qualified this requirement by the word "ordinarily."[101] This, too, could discourage a voluntary disclosure in circumstances where the discloser, being unsure of all the facts, wanted, initially, to pursue the matter informally. However, it is unlikely that the government would refuse to listen to an unwritten, informal, initial notification.

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[97] 15 C.F.R. § 764.5.
[98] 15 C.F.R. § 787A.15(b)(3).
[99] 15 C.F.R. § 764.5(b)(3).
[100] 15 C.F.R. § 764.5(c)(2)(i).
[101] 15 C.F.R. § 787A.15(c)(2)(i).

8.5.9 Separation of Powers

In addition to the *Hoffman* case,[102] the Central District of California's district court heard another prosecution, *United States v. Bozarov*,[103] in which the very core of Commerce's rule-making authority was challenged.

Defendant in this case was indicted for having illegally exported computer disc manufacturing equipment. Taking their cue from the successful petition for certiorari in *United States v. Touby*,[104] defendant's counsel moved to dismiss the indictment against him on the grounds that the rulemaking authority delegated to the Secretary of Commerce under the EAA (as it existed at the time of Bozarov's alleged transgressions) violates the doctrine of separation of powers and the due process clause of the Fifth Amendment.

In this case, Touby challenged the delegation of temporary drug scheduling power to the Attorney General under the Drug Abuse Prevention and Control Act, an act, according to Bozarov, strikingly similar to the EAA in its delegation of rule-making authority because of the ability of the delegee in each case to criminalize conduct without the possibility of judicial review to ensure that Congress' guiding principles have been observed. Although the Supreme Court later decided that the delegation of temporary scheduling power did not violate the doctrine of separation of powers,[105] the court nonetheless insisted that delegations of legislative authority to executive officers must be subject to judicial review, to permit a court to ascertain whether the guiding standards have been followed. Bozarov argued strenuously, but eventually unsuccessfully, that the delegation of authority to the Secretary of Commerce, carrying characterizations of conduct into the criminal area, goes far beyond the temporary rule-making authority unsuccessfully challenged in *Touby*.

District Judge Keller granted the motion to dismiss the *Bozarov* case on the separation of powers argument. The government appealed to the Ninth Circuit Court of Appeals. A three-judge panel reversed Judge Keller's decision on August 10, 1992.[106] After finding that

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[102] Discussed in section 8.5.5.7 *supra*.

[103] 507 U.S. 917 (1993).

[104] 909 F.2d 759 (3d Cir. 1990).

[105] See Touby v. United States, 500 U.S. 160 (1991).

[106] See United States v. Bozarov, 974 F.2d 1037 (9th Cir. 1992).

Bozarov had standing to challenge the constitutionality of the Export Administration Act, the court held that the EAA did not violate the non-delegation doctrine even though the Secretary of Commerce's decision to control a given item is immune from judicial review, citing that Congress may delegate such powers under "broad general directives" so long as the general policy and the boundaries of the delegated authority are clearly delineated under "intelligible principles." In so doing, however, the court noted:

> This appeal involves a question that the Supreme Court apparently has not yet squarely confronted: does a delegation of legislative power to the executive that is statutorily exempt from judicial review violate the non-delegation doctrine? In essence, this question turns on the purpose of requiring Congress to lay down an "intelligible principle." The government argues that the purpose of an intelligible principle is simply to channel the discretion of the executive and to permit Congress to determine whether its will is being obeyed. Bozarov contends that the purpose of requiring an intelligible principle is to permit a court to ascertain whether the will of Congress has been obeyed. We believe that the government has the better of the argument [citing in a footnote that the Supreme Court only twice has invalidated statutes on nondelegation grounds: *Schechter* (295 U.S. 495) and *Panama Refining* (293 U.S. 388), but that there seems to be some impetus for revitalizing inquiry into the doctrine: *Industrial Union Department v. American Petroleum Institute*, 488 U.S. 607, 686 (1980).

Bozarov also contended that the preclusion of judicial review violated his right to due process, but again the Ninth Circuit Court found that its earlier decisions in *Spawr Optical* and *Mandel* were dispositive of this issue.

Given the Ninth Circuit panel's observations quoted above, there would appear to be some room for further judicial scrutiny of the issues raised by the *Bozarov* case. The U.S. Supreme Court, however, denied Bozarov's petition for certiorari.[107]

8.5.10 Enforceability of Expired EAA

The EAA most recently expired on August 20, 1994, when the President signed Executive Order 12,924. With this order the

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[107] 61 U.S.L.W. 3581 (1993).

President purported to continue in force all of the regulations and, "to the extent permitted by law," the EAA itself. In four matters in the Commerce Department,[108] the administrative law judge filed recommended decisions in these appeals from the imposition of temporary denial orders (TDOs) that, in essence, held that the International Emergency Economic Powers Act[109] did not suffice as a basis for the continuation of the administrative sanctions authorized by the EAA. With the expiration of the EAA on September 30, 1990, and Congress', failure to reenact that statute at that time, the administrative law judge concluded that there simply was no legal basis for the imposition of temporary denial orders.

The recommended decisions in all four cases were vacated by the Acting Under Secretary of Commerce for Export Administration on July 29, 1992, and July 30, 1992. In her opinion and order in each of these cases, the Under Secretary held that the earlier opinion rendered by the Department's General Counsel correctly stated the law on the matter and ordered the temporary denial orders imposed. These cases were appealed to the Court of Appeals for the District of Columbia. The decision on the *Iran Air* matter turned on other issues.[110] In that case, the court dealt with the issue of who has the final say as regards matters of law in administrative proceedings. The Commerce administrative law judge lost on that point to the Under Secretary. The question of the continued validity of those TDOs under IEEPA became moot when the EAA was reenacted in March 1993.

As indicated earlier, the President purported to extend the regulations beyond the expiration of the EAA in August 1994, by promulgating Executive Order 12,924 on August 20, 1994. Although there is little doubt that the President has the power to promulgate rules in the discharge of his foreign affairs function (even at the expense of the Administrative Procedures Act safeguards), there is likewise little doubt that the President cannot unilaterally extend or reenact legislation without Congressional approval. The only

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[108] *Iran Air, In the Matter of Karl Cording, A. Rosenthal (Pty.) Ltd.*, and *Amiri* (Docket Nos. OEE 0120-01, OEE-1-92, OEE-2-92 and OEE-3-92, respectively. A fifth respondent who appeared with Mr. Amiri did not appeal the temporary denial order.

[109] 50 U.S.C. §§ 1701 *et seq.*

[110] See discussion at section 8.3 *supra.*

authority for the Office of Export Enforcement to obtain and execute search warrants is found in the EAA itself—not the regulations. It would appear, therefore, that unless the OEE has other statutory grants of authority, searches conducted between September 30, 1990, and the reauthorization of the Act in March 1993 were invalid and the evidence thereby obtained could not be used at trial.

Given the strong presumption of validity accorded to statutory enactments and to regulations promulgated pursuant to those enactments, no individual stands a very good chance of exoneration by relying upon this sort of legal challenge.

On June 30, 1994, the EAA was extended without change. On August 20, 1994, however, it was allowed to lapse when efforts to revive the law were not completed by that revised expiration date. Every version of the EAR has contained a "sunset" provision.[111]

In passing and on a final note, the Arms Export Control Act and the ITAR do not suffer from an infirmity similar to the one discussed above for the EAA, as there is no "sunset" provision in the AECA.

8.6 EXTRATERRITORIAL SANCTIONS

There are four types of sanctions against exports of non-U.S.-origin items by foreign persons from foreign countries, described respectively in EAA section 11A (exports of COCOM-controlled items),[112] section 11B (exports of missile technology), section 11C (exports of chemical and biological weapons, or "CBW"),[113] and the Nuclear Proliferation Prevention Act of 1994 (the "NPPA").[114]

Although sections 11B and 11C purported to amend the EAA, the EAA itself had expired and had not yet been renewed. Thus, their legal status was ambiguous until the EAA was revived in March 1993 by Public Law 103-10 but became ambiguous again after the EAA expired in 1994.

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[111] 50 U.S.C. app. 2419.

[112] Section 11A was added to the EAA in 1988.

[113] Sections 11B and 11C were enacted as portions of Pub. L. Nos. 101-510 and 102-182 in 1990 and 1991, respectively.

[114] Pub. L. No. 103-236, 108 Stat. 524 (Title VIII), 22 U.S.C. § 3201. The NPPA was incorporated into H.R. 2333, the Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, in the House-Senate Conference on April 25, 1994, and enacted by the Congress on April 30, 1994. A copy of the section 11 amendments is found in Appendix 8-1 and a copy of the NPPA is found in Appendix 8-2.

Other countries do not accept U.S. assertions of extraterritorial jurisdiction as a matter of principle, but in practice they often have little choice but to acquiesce. Ironically, the very laws that impose these sanctions cast doubt on U.S. jurisdiction.

EAA section 11A applies its sanctions to a parent, affiliate, subsidiary, or successor entity of the foreign person engaged in the sanctioned activity but conditions an exclusion from this provision in part on action by "the government of the country with jurisdiction over the parent, affiliate, subsidiary, or successor entity." Section 11B imposes sanctions against activities involving goods or technology that "... would be, if it were United States-origin equipment or technology, subject to the jurisdiction of the United States...." Section 11C imposes sanctions against activities involving goods or technology that "... would be, if they were United States goods or technology, subject to the jurisdiction of the United States...." Section 821(b)(1) of the NPPA urges the President, if the object of the sanctions is a foreign person, to consult "with the government with primary jurisdiction" and the heading of section 821(b)(2), "Actions by Government of Jurisdiction," even omits the "primary" qualifier.

The EAR conspicuously enshrines the controversial notion of extraterritoriality. It makes plain the intent that denial orders have an extraterritorial dimension.[115] Outside of the United States, even a foreign person who is not a denied person may not engage in a wide range of activity concerning a denied person's access to U.S.-origin items.[116]

Moreover, transactions involving even non-U.S.-origin items by non-U.S. persons outside the United States may be found to have violated the COCOM or non-proliferation provisions of sections 11A, 11B, or 11C of the EAA or of the Nuclear Proliferation Prevention Act. Whether dealing with a denied party would amount to a violation of those statutes is a matter for debate. What isn't debatable is the long shadow that extraterritorial application of U.S. trade law has cast over U.S. relations with its trading partners on these issues for many years.

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[115] 15 C.F.R. § 764.

[116] 15 C.F.R. § 764 Supplement 1(b) Second A-C. This is broader than the old 15 C.F.R. § 788A Supplement 1(b)(1, 2), by adding facilitating activity.

The Helms-Burton secondary boycott of Cuba and similar legislation affecting Iran and Libya have greatly exacerbated difficulties in U.S. relations with its allies over extraterritorial controls.

8.6.1 COCOM-Related Sanctions

EAA section 11A requires a prohibition on contracts with the U.S. Government and on imports into the United States for at least two years if a foreign person violates a regulation issued by a "country" pursuant to a COCOM agreement and such violation results in substantial enhancement of Soviet and East bloc capabilities in critical technologies determined to represent a serious adverse impact on the strategic balance of forces. The sanctions apply to a parent, affiliate, subsidiary, or successor entity unless that entity has not knowingly violated the regulation and the government of the country with jurisdiction over that entity had in effect an effective export control system. In addition, the President must seek compensation for the costs of research, development, and procurement of required new defensive systems from the sanctioned persons and the government with jurisdiction over that person. Moreover, the Attorney General may bring an action for damages in a U.S. court against the person who committed the violation, a person owned or controlled by the violator, or a person who owns or controls the violator.

This amendment was prompted by a Toshiba export of COCOM-controlled machine tools and a Kongsberg export of related software to a Soviet shipyard without the required Japanese and Norwegian licenses. These tools were alleged to have made possible quieter Soviet submarine propellers, which in turn required expensive U.S. counter measures. However, the authors' research (which has been communicated to, and has not been refuted by, knowledgeable U.S. Government officials) indicates that:

- French machine tools were at the shipyard before the Japanese tools arrived.
- Soviet production of quieter propellers commenced before the Japanese tools arrived.
- Production of submarines at that shipyard declined after arrival of the Japanese tools.

- Neither the Japanese nor the Norwegians knew the technology necessary to make propellers quiet (this had apparently been provided by a defector from the U.S. Navy).
- Soviet submarines which were quieter than U.S. submarines did not use propellers at all and were based on indigenous Soviet technology.

Be that as it may, the sanctions were applied against the Japanese and Norwegian companies.

8.6.1.1 Exceptions

Because the U.S. Defense Department was dependent upon Toshiba as a source of supply for various items, the legislation excluded:

- Existing contracts.
- Spare parts.
- Component parts essential to U.S. products or production.
- Routine servicing and maintenance; information and technology.
- Sole source suppliers of essential defense articles or services.
- Articles or services essential to national security under defense co-production agreements.

8.6.1.2 Effects on U.S. Persons

Since EAA section 11A does not define "foreign person," there is a possibility that a "permanent domestic establishment of any foreign concern" or "any foreign subsidiary or affiliate of any domestic concern which is controlled in fact by such domestic concern" might be construed to be a foreign person subject to these sanctions, even though included in the EAA section 16(2) definition of "United States person." Also related to this issue, a U.S. person would be subject to these sanctions if that person were a parent, affiliate, subsidiary, or successor of the foreign violator and knew of the violation. Even if innocent of the violation, a U.S. parent or subsidiary might be brought into court for damages.

A U.S. person might be indirectly affected if dependent upon the foreign violator as a source of supply for imports not qualifying for one of the exceptions.

8.6.1.3 Effect of COCOM's Demise

The viability of EAA section 11A is largely impaired because it speaks directly to COCOM, which no longer exists. However, it is conceivable that section 11A violations occurring prior to COCOM's dissolution could be sanctioned for years to come. Moreover, there may also be a basis for EAA section 11A sanctions to be imposed for violations occurring after the disbanding of COCOM on March 31, 1994. The control list agreed by Wassenaar, the successor organization to COCOM, parallels closely the old COCOM list. Moreover, many U.S. controls based on COCOM continue:

- The State list of prohibited destinations for munitions[117] continues to include COCOM-proscribed destinations (except Albania, Bulgaria, Estonia, Latvia, Lithuania, and Romania);
- Treasury Transaction Control Regulations continue to list all COCOM-proscribed destinations (plus Cambodia, Czech Republic, Poland, and Slovak Republic).[118]
- Commerce has:
  —Continued to control items which had been on the COCOM list to all destinations except Canada, as modified by various exceptions from license requirements.
  —Continued special controls to COCOM-proscribed destinations.[119]
  —Limited License Exception CIV (which removes validated license requirements for some COCOM items to COCOM-proscribed destinations) to civil end-users and civil end-uses and, for the most part, to items that were approvable at national discretion when COCOM was reviewing proposed exports for other COCOM items.

Pursuant to EAA section 11A(a)(1) the President shall apply sanctions if:

> a foreign person has violated any regulation issued by a country to control exports for national security purposes pursuant to the agreement of the group known as the Coordinating Committee. . . .

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[117] 22 C.F.R. § 126.1.

[118] See section 3.5 in Chapter 3.

[119] E.g., 15 C.F.R. § 736.2(b)(3) and (b)(8).

If a foreign person in another COCOM member or COCOM cooperating country were to violate a regulation of his government which parallels existing U.S. COCOM-related controls, EAA section 11A might still be construed to be relevant. It might be argued that, even though COCOM is no longer in existence, the regulation was imposed pursuant to COCOM agreement.

8.6.2 Missile-Related Extraterritorial Sanctions

EAA section 11B imposes, in addition to the U.S. territorial sanctions described in section 8.2 above, denial of all EAA or AECA export licenses for at least two years to a foreign person violating missile Category I controls, denial of EAA or AECA missile-related licenses for two years to a foreign person violating Category II controls, and denial of imports into the United States if the foreign person's actions contributed substantially to a missile capability in a non-MTCR country. The sanctions apply not only against the exporter but also to a foreign person who "transfers or otherwise engages in the trade."

8.6.2.1 Exceptions

The same exceptions apply as for the COCOM-related sanctions.[120] In addition, the missile-related sanctions may be waived by a Presidential determination that a waiver is essential to U.S. national security, provided that the Congress is notified at least 20 working days before issuing the waiver.

Occasionally, sanctions are imposed without naming the sanctioned parties, because "publication would be harmful to the national security of the United States."[121] Inasmuch as sanctions cannot be effective under such circumstances, one surmises that information was available requiring sanctions but that the President then determined that a waiver was essential to U.S. national security, perhaps to avoid revealing sensitive sources.

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[120] See section 8.6.1.1 *supra*.

[121] Public Notice 1839, dated July 5, 1993, in 58 Fed. Reg. 40,685 (July 29, 1993), referred to two determinations pursuant to AECA section 73 (which is comparable to EAA section 11B).

8.6.2.2 Effects on U.S. Persons

For purposes of EAA section 11B, "foreign person" means any person other than a United States person. Therefore, a "permanent domestic establishment of any foreign concern" or "any foreign subsidiary or affiliate of any domestic concern which is controlled in fact by such domestic concern" is not a foreign person subject to these sanctions. However, as for COCOM-related sanctions, a U.S. person might be indirectly affected if dependent upon the foreign violator as a source of supply for imports not qualifying for one of the exceptions.

Of more significance in practice are the indirect effects on U.S. exporters. For example, these sanctions were imposed on an Indian importer that had contracted to obtain missiles and missile technology from a Russian firm. A compromise was reportedly worked out with Russia, whereby the United States agreed to lift sanctions on the Russian firm if the contract was only partially fulfilled, *i.e.*, to supply commodities but not technology.[122] But exports from many U.S. suppliers to the Indian Space Research Organization (ISRO) were held up for months. Since a Category I export was involved, it became necessary to interpret "items the export of which is controlled under this Act." There is some legislative history that this was intended to apply only to items specified on the Commerce Control List as requiring a license to the country where the sanctioned foreign person was located. However, absent a Justice ruling to this effect, State was unwilling to permit export of any item to ISRO, no matter how unrelated to missiles the item may be. In other words, items otherwise not requiring a license to India were being held up. This reasoning was based, at least in part, on the requirement for a validated license for

> any commodity, software, or technical data (excluding technical data exportable under the provisions of general license GTDA or commodities identified in ECCN OA98) when the exporter knows that the commodities, software, or technical data . . . will be used in the design, development, production or use of missiles in or by a country listed in Supplement No. 6 to this Part 778 . . . (India was so listed).[123]

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[122] *Washington Post*, July 17, 1993.

[123] 15 C.F.R. § 778.7A(c)(1), continued substantially unchanged in 15 C.F.R. § 744.3(a)(2) and 15 C.F.R. § 732.2(b)(1).

De facto, it appears that EAA section 11B is overriding the "destined for a project" or "will be used" qualifications in the EAR, while the EAR is overriding what apparently would otherwise be a more liberal interpretation of section 11B by controlling all, rather than just specified, items.

This ISRO problem was finally resolved on May 6, 1994, when the sanctions expired. Thereafter, firms were able to export G-DEST (now "no license required") items to ISRO unless they knew that the item would be used directly for missile purposes. There is an even broader impact on AECA-controlled items to China. AECA section 73(a) imposes sanctions against a foreign person exporting MTCR equipment or technology. The so-called "Helms Amendment" states:

> . . . in the case of countries with non-market economies (excluding former members of the Warsaw Pact), the term "person" means —
> (i) all activities of that government relating to the development or production of any missile equipment or technology; and
> (ii) all activities of that government affecting the development or production of electronics, space systems or equipment, and military aircraft.[124]

Thus, AECA sanctions apply to a broad sector of Chinese government activity rather than just to a narrowly defined exporting entity.

There was some concern that the Helms Amendment might also apply to exports of EAA-controlled items. EAA section 11B(b)(1)(A) includes the following:

> . . . if the President interpreted that a foreign person exports [a missile-related item which would, if U.S.-origin, be subject to EAA jurisdiction] or if the President has made a determination with respect to a foreign person under section 73(a) of the [AECA], then the President shall impose on that foreign person the applicable sanctions under subparagraph (B).[125]

If that "foreign person" were interpreted to mean the foreign "person" as defined in the AECA, the sanctions would affect exports of EAA items to many Chinese government activities. However, sanctions

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[124] AECA § 74(8)(B).
[125] EAA § 11B(b)(1)(A).

imposed against Chinese entities[126] have limited the broader interpretation to exports of AECA-controlled items and to U.S. Government contracts relating to MTCR equipment or technology. However, even the EAA sanctions apply not only to:

> Ministry of Aerospace Industry, to include China Precision Machinery Import-Export Corporation (CPMIEC)(China)

but also to:

> their divisions, subunits, and any successor entities. Such additional entities include, but are not limited to, a list of ten Chinese organizations.[127]

Information made public by the U.S. Government is inadequate to evaluate the Chinese response that no MTCR violation had occurred. Neither the press release nor the subsequent *Federal Register* notice identified the offending "missile-related transfers," except for a reference in the press release to "numerous reports from many sources about an M-11 missile related transfer from China to Pakistan."

It is not even clear whether the United States is maintaining that the reported transfer involved an item which, if U.S. origin, would be under EAA or under AECA jurisdiction. Neither the extent of the sanctions nor the determination by the Secretary of State provides a clue on this point. Sanctions are identical for EAA and AECA items, since each Act calls for sanctions under the other Act.[128] State Department press guidance evaluated the impact of these sanctions as follows:

> Most items that would otherwise be affected by Category II sanctions are already covered by the sanctions imposed after the 1989 Tienanmien Square incidents.
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> . . . The effect of the sanctions on Pakistan would be more limited, since the U.S. permits very little MTCR Annex-Item trade with Pakistan.

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[126] 58 Fed. Reg. 45,408 (August 27, 1993).

[127] On August 25, 1993, the Department of State issued a press release announcing a U.S. Government determination that Chinese and Pakistan entities had engaged in missile-related transfers that required the imposition of Category II sanctions.

[128] Executive Order 12,851 of June 11, 1993, delegated authority to the Secretary of State to make determinations under both EAA section 11B(a)(1)(A) and AECA section 73(a)(1).

> . . . The principal effect of Category II sanctions will be to prohibit the export to the sanctioned entities of satellites that contain U.S.-licensed items on the MTCR Annex.

Communication satellites and other spacecraft probably include MTCR-listed components, such as inertial guidance systems.

The State Department interprets ITAR as controlling a component regardless of the manner of its containment in otherwise uncontrolled equipment. It is not clear how Commerce will interpret its regulations with respect to the applicability of this EAA section 11B sanction on non-MTCR equipment containing MTCR components.

Commerce regulations remove from control a low level of U.S.-origin content in foreign-made items.[129] Otherwise controlled computers are not controlled if they are contained in uncontrolled equipment, essential for the operation of the other equipment, and not the "principal element" (more than 35 percent of the total value) thereof (ECCN 4A003 Note 2). Section 5(m) of the EAA as amended in 1988 prohibits controls under section 5 on a good solely because it contains a controlled component that is essential to the functioning of the good, customarily included in sales of the good, and comprises 25 percent or less of the total value of the good. Section 5(m) is not applicable to missile controls, because they are authorized under EAA section 6 rather than under EAA section 5. However, this statutory requirement has not yet been incorporated into Commerce regulations and Commerce could, in so doing, apply the formula to section 6 controls even though not required to do so.

A Commerce regulation would also be useful to clarify whether the section 11B prohibition of "licenses for the transfer to such foreign person" would apply to a transaction in which U.S. persons retained title to a satellite and the Chinese simply launched it.

The China-Pakistan Category II sanctions do not raise the as yet unresolved ISRO question concerning the impact of Category I sanctions on license requirements for items otherwise eligible for "no license required." The press release and *Federal Register* notice do not explicitly inform exporters that such a license is required. But, although the government has not "informed" exporters that a license is required, an exporter must nevertheless seek such a license if he "knows" that the commodities, software, or technical

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[129] 15 C.F.R. § 734.4.

data are destined for specified projects (M Series or CSS-2 Missiles in China or Hatf Series Missiles in Pakistan)[130] or will be used in the design, development, production, or use of missiles in or by China or Pakistan.[131] Since it is now common knowledge that the U.S. Government believes that the named Chinese and Pakistan entities are involved in M-1 missile-related activity, prudent exporters will carefully review proposed exports of anything to these entities for evidence of missile use.

8.6.3 Chemical and Biological Weapons-Related

EAA section 11C imposes, in addition to sanctions against exports from the United States,[132] a prohibition on contracts with the U.S. Government and on imports into the United States for at least 12 months if a foreign person knowingly and materially contributed to a chemical or biological weapons capability in a country designated by the President[133] through export from a foreign country of any item that would be, if a U.S. good or technology, subject to U.S. jurisdiction under the EAA.

These sanctions also apply to any successor entity to that foreign person, any foreign person parent or subsidiary of that foreign person who knowingly assisted the sanctioned activity, or any foreign person affiliate of that foreign person who knowingly assisted and is controlled in fact by that foreign person.[134]

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[130] 15 C.F.R. § 740 Supplement 1 Country Group D:4 footnote 1.

[131] 15 C.F.R. § 744.3(a).

[132] Described in section 8.2 *supra*.

[133] Such designations to include at least terrorism supporting countries; see section 4.1.1 *supra*.

[134] On February 8, 1994, CBW procurement and import sanctions were imposed on three firms in Thailand: W&M Limited Partnership, SPC Supachoke, and The Handle Group (59 Fed. Reg. 10,663 (Mar. 7, 1994)). On July 16 and August 19, 1994, CBW procurement and import sanctions were imposed on (1) three entities without indicating the country, or countries, in which they were located: Mana International Investments, Europol Holding, and Nahum Manbar (owner/manager of these two firms), and (2) Alberto Di Salle, an Italian National (59 Fed. Reg. 40,956 (Aug. 10, 1994), and 59 Fed. Reg. 44,222 (Aug. 26, 1994)). These Federal Register Notices did not describe the activities requiring the sanctions. The informally given reason that the August 10, 1994, Notice omitted the location of the entities was to protect intelligence sources.

8.6.3.1 Exceptions

Exceptions include those applicable to section 11A[135] plus medical or other humanitarian items.

8.6.3.2 Effects on U.S. Persons

Subsidiaries or affiliates controlled in fact by a U.S. firm are included in the EAA section 16(2) definition of "United States person" but could be sanctioned as a foreign person (or as a foreign subsidiary or affiliate of a foreign person engaged in sanctioned activities) under section 11C, because the 11C definition of "foreign person" includes:

> a corporation, partnership, or other entity . . . which has its principal place of business outside the United States.

A U.S. person who was the successor of the foreign violator would be sanctioned even if the successor was unaware of the violation. Unlike the COCOM-related sanctions, this would be true whether or not the successor entity knew of the violation.

Unlike the missile-related sanctions, U.S. exports are not put at risk.

As for both the COCOM- and missile-related sanctions, a U.S. person might be indirectly affected if dependent upon the foreign violator as a source of supply for imports not qualifying for one of the exceptions.

8.6.4 Nuclear Proliferation Prevention Act

The Nuclear Proliferation Prevention Act (NPPA) imposes two export-related sanctions. One denies participation in U.S. Government procurement to a person who has made a proscribed nuclear export. The other denies exports to a country that has engaged in a proscribed nuclear activity.

Non-eligibility to participate in U.S. Government procurement activities applies to a foreign person as well as to a U.S. person who:

> has materially and with requisite knowledge contributed, through the export from the United States or any other country of any

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[135] See section 8.6.1.1 *supra*.

> goods or technology (as defined in section 830(2), to ... efforts ... to acquire unsafeguarded special nuclear material or to ... acquire any nuclear explosive device.[136]

"Requisite knowledge" is defined as situations in which a person "knows," as "knowing" is defined in the Foreign Corrupt Practices Act.[137] This Act was amended in 1988 to limit the scope of the *scienter* requirement in "reason to know" cases.[138]

The definition of "goods or technology" in section 830(2) includes items designated pursuant to section 309(c) of the Nuclear Non-Proliferation Act. These are the items on the Commerce Nuclear Referral List (NRL), *i.e.*, those marked NP on the Commerce Control List.

Presumably, a person would not be sanctioned because of an export pursuant to a license or by relying on the absence of a license requirement. This presumption is based on the following from the NPPA:

> ... Any person who relies in good faith on ... an advisory opinion that the proposed activity would not subject a person to such sanction ... may not be made subject to such sanction....[139]

By analogy, a license or the lack of a license requirement constitutes such an advisory opinion. However, this is only a presumption and the reasoning is weakened by the NPPA provision that the Secretary of State, in consultation with the Secretary of Defense, may issue such an advisory opinion, whereas it is Commerce, rather than State or Defense, which issues licenses and regulations specifying when licenses for items on the Commerce Control List are, or are not required.

The section 830(2) definition of "goods or technology" limits the term to nuclear items, which are controlled by the Nuclear Regulatory Commission or the Department of Energy, plus dual-use items having both nuclear and non-nuclear applications, which are designed pursuant to section 309(c) of the Nuclear Non-Proliferation Act and are controlled by the Department of Commerce. Items on the

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[136] NPPA § 821(a)(1).

[137] Section 104 of the Foreign Corrupt Services Act 1977 (15 U.S.C. § 78dd-2).

[138] NNPA section 821(a)(4), which refers to section 104 of the Foreign Services Act of 1977 (15 U.S.C. § 788dd-2).

[139] NPPA § 821(d).

so-called Nuclear Referral List (NRL), which are marked NP on the Commerce Control List (CCL), are clearly designated pursuant to section 309(c). Almost all NRL items are eligible for "no license required" for export to other members of the Nuclear Suppliers Group without a license and equipment for use with a nuclear plant[140] requires a license to only a relatively few countries.[141] Thus, the presumption that regulatory provisions that no license is required constitutes an advisory opinion appears to have practical significance. On the other hand, there is a risk in relying on such an appearance, because there are four "catch-all" provisions that might trigger this sanction:

- License applications for any non-NP item intended for a nuclear related end-use or end-user, other than a short supply item, will be reviewed on the basis of nuclear licensing policy.[142]
- Export of any item on the CCL from the United States regardless of origin or reexpport of any U.S.-origin item on the CCL is prohibited if the exporter or reexporter knows it will be used in one of several specified nuclear activities.[143]
- Export, reexport, or transfer to or in any country by a U.S. person of any item regardless of origin is prohibited if that person knows it will be used for nuclear explosive devices in or by a listed country.[144]
- Support of a prohibited export, reexport, or transfer by a U.S. person is prohibited.[145]

Interpreting section 309(c) as applying to any of these "catch-all" situations might seem far-fetched, since "catch-all" would appear to be the antithesis of designations of goods and technology. But it is perhaps no more far-fetched than the broad interpretation of a similar missile sanction as it affected exports to the Indian Space Research Organization.[146]

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[140] ECCNs 2A290 to 2A292.

[141] Listed in NP Column 2 the Country Chart in 15 C.F.R. § 738 Supplement 1.

[142] 15 C.F.R. § 742.3(b)(2).

[143] 15 C.F.R. § 744.2(a).

[144] 15 C.F.R. § 744.6(a)(1)(i)(A).

[145] 15 C.F.R. § 744.6(a)(1)(ii).

[146] See section 8.6.2.2 *supra*.

A 90-day time delay in imposition of sanctions "with respect to a foreign person" is permitted to provide time for consultation with the "government of jurisdiction" over that person.[147] The U.S. Government is unlikely to consider that a foreign government would be the government of jurisdiction with respect to a foreign person within the United States. Therefore, such consultation would probably be limited to instances involving a reexport from a foreign country of a U.S.-origin item by a foreign person.

The NPPA also mandates denial of exports to a country that has engaged in proscribed nuclear activities, in what is known as the Glenn Amendment.[148] The proscribed nuclear activities are:

> (A) Transfers to a non-nuclear weapon state a nuclear explosive device,
> (B) is a non-nuclear-weapon state and either—
> (i) receives a nuclear explosive device, or
> (ii) detonates a nuclear explosive device, or
> (C) transfers to a non-nuclear weapon state any design information or component which is determined to be important to . . . any nuclear explosive device, or
> (D) is a non-nuclear weapon state and seeks and receives any design information or component . . . important to . . . any nuclear explosive device.[149]

Although this legislation is part of the Arms Export Control Act (AECA), it prohibits exports not only of munitions items controlled under the AECA but also "specific goods and technology (excluding food and other agricultural commodities)" controlled under "authorities of section 6 of the Export Administration Act of 1979."[150]

In 1998 both India and Pakistan violated the Glenn Amendment by detonating nuclear bombs. The sanctions that were implemented against these countries on November 19, 1998, established denial licensing policy not only for all NRL items but also for all items designated as of concern for missile technology (MT) reasons, for all other items including those "not elsewhere specified" (identified

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[147] NNPA § 821(b).

[148] NPPA section 826(a), which adds sections 101, 102, and 103 to the Arms Export Control Act (AECA).

[149] AECA § 102(b)(1).

[150] AECA § 102(b)(2)(G).

as EAR99) to a list of government, parastatal, and private entities, and for all other items except EAR99 to a list of military entities.[151]

The definition of "goods and technology" as being limited to nuclear items plus dual use items designated under section 309(c) applies to Glenn Amendment sanctions as well as to participation in government procurement sanctions. The India and Pakistan sanctions, which are still in effect as of this writing, clearly went beyond this definition. Indeed, these sanctions even go beyond the four nuclear "catch-all" provisions, since they apply even if there is no known relationship of the export to a nuclear activity. Applicability of a "specified goods and technology" provision to items "not elsewhere specified" is an extreme example of overkill, especially when one considers that items "not elsewhere specified" include food and other agricultural commodities which are explicitly excluded from the Glenn Amendment.

8.6.4.1 Exceptions

The following are excepted from the NPPA sanction of non-eligibility to participate in U.S. Government procurement activities:

- Existing contracts.
- Parts essential to U.S. products.
- Servicing not otherwise available.
- Information and technology essential to U.S. products.
- Medical or other humanitarian items.
- With respect to defense articles or defense services:
  —Exercise options for production essential to security.
  —Sole source supplier.
  —Essential to co-production.[152]

The only License Exception available for the India and Pakistan sanctions described above is for civil aviation safety.[153]

8.6.4.2 Effects on U.S. Persons

Even a sanction applied to a foreign person exporting a non-U.S.-origin item from a foreign country could affect a U.S. person if

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[151] 15 C.F.R. §§ 742.16(b)(2), 744.12, and 744 Supplement 4.
[152] NPPA § 821(c)(2).
[153] 15 C.F.R. §§ 742.16(a), 744.11(b), and 744.12(b).

that U.S. person were related to the foreign person (section 821(a)(2) includes in the persons against which the sanction is to be imposed any successor entity and a parent, subsidiary, or affiliate with requisite knowledge).

In other situations, such a relationship might mean that the foreign person was deemed to be a U.S. person. However, this is unlikely in the NPPA context. Section 830(7) defines "United States person" to mean:

> (A) an individual who is a citizen of the United States or an alien admitted for permanent residence to the United States; or
> (B) a corporation, partnership, or other nongovernment entity which is not a foreign person

and section 830(l) defines "foreign person" to mean:

> (A) an individual who is not a citizen of the United States or an alien admitted for permanent residence to the United States; or
> (C) a corporation, partnership, or other non-government entity which is created or organized under the laws of a foreign country or which has its principal place of business outside the United States.

Thus, a firm that has its principal place of business outside the United States is a foreign person for NPPA purposes even if it is a parent, subsidiary, or affiliate of a U.S. firm.

A U.S. person unrelated to a sanctioned foreign person would also be affected if the participation of that foreign person was necessary to enable the U.S. person to perform a U.S. Government contract. However, in this event, one or more of the exceptions listed in section 8.6.4.1 might avoid the mandatory imposition of sanctions.

8.7 STATE MUNITIONS CONTROLS

The range of actions by U.S. exporters which constitute violations of arms export controls is broad and violators are subject to painful criminal or civil penalties.

8.7.1 Authority

The Arms Export Control Act (AECA) authorizes both civil and criminal penalties.[154]

Part 127 of the International Traffic in Arms Regulations (ITAR) concerns violations and penalties and part 128 concerns administrative procedures.[155]

Sections 1702 and 1703 of the National Defense Authorization Act for Fiscal Year 1990-1991 require sanctions against foreign firms engaged in missile proliferation.

8.7.2 Violations in General

In general terms, it is a violation to export without the requisite written approval from the Office of Defense Trade Controls; to aid or abet the commission of a prohibited act or the omission of a required act; or to act on behalf of a debarred person or to the benefit of a debarred person in a transaction that requires approval.[156]

A person granted a license is responsible for the acts of employees, agents, and authorized persons to whom possession of the licensed item has been entrusted regarding the handling of such item abroad. A person abroad subject to U.S. jurisdiction who obtains temporary custody of a defense article exported from the United States or produced under U.S.-authorized manufacturing license or technical assistance agreement is bound by ITAR in the same manner as the original owner-transferor, irrespective of the number of intermediate transfers.[157]

8.7.3 Misrepresentation and Omission of Facts

It is unlawful to use any export or intransit control documentation containing a false statement, misrepresentation, or an omission of a material fact when exporting, shipping, or temporarily importing defense articles and/or services.[158] It is important for an exporter to be precise when completing these documents, as errors could be

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[154] 22 U.S.C. § 2778(c), (e), and (g). Civil penalties are authorized by 22 U.S.C. § 401.

[155] 22 C.F.R. §§ 127 and 128.

[156] 22 C.F.R. § 127.1.

[157] 22 C.F.R. § 127.1(b).

[158] 18 U.S.C. § 1001, 22 U.S.C. §§ 2778 and 2779, and 22 C.F.R. § 127.2(a).

considered a misrepresentation of facts. The area where exporters are most apt to err is in identifying the value of goods to be exported. It is important for the exporter or his agent to assure that the appropriate values are identified on all documents. The Harmonized System or the Foreign Trade Statistics Regulations may be of some assistance in determining how the value should be computed.

Export, shipping, or temporary import control documentation includes the following:

- An application for permanent export or temporary import license, including supporting documentation
- Shipper's Export Declaration
- Invoice
- Declaration of destination
- Delivery verification
- Application for temporary import
- Application for registration
- Purchase order
- Foreign Import certificate
- Bill of lading
- Airway bill
- Non-transfer and use certificate (DSP-83)
- Any other document used in the regulation or control of defense articles, defense services, and technical data for which a license or approval is required.[159]

8.7.4 Penalties for Violations

Penalties for criminal and civil or administrative violations differ.

8.7.4.1 Criminal Penalties

Penalties for willful violations may be up to a $1,000,000 fine for each violation, imprisonment up to ten years, or both.[160] In 1985 the limit on fines was increased from $100,000 to $1,000,000, the phrase "for each violation" was added, and the period of

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[159] 22 C.F.R. § 127.2(b).

[160] Sections 38 or 39 of the Arms Export Control Act (22 U.S.C. §§ 2778 and 2779).

imprisonment was increased from two to ten years. Such penalties may be imposed not only for willful violations of the AECA or regulations issued under that Act but also for willfully, in a registration or license application or required report, making any untrue statement of a material fact or omitting to state a material fact required to be stated therein or necessary to make the statements therein not misleading. The Criminal Fine Enforcement Act of 1984 also applies.

8.7.4.2 Civil Penalties

The President is authorized to exercise the same powers as described in Export Administration Act sections 11(c), (d), (e), and (g) and 12(a) and (c), which apply to export controls administered by Commerce except that the civil penalty for each violation may be up to $500,000.[161]

The President is authorized to disapprove applications by persons indicted for, or convicted of, a violation of any of 11 statutes.[162] A license may not be issued to a person convicted of such a violation except upon a Presidential determination of mitigating factors. This section was added to the Arms Export Control Act in 1988. See sample transmittal letter at Table 2-1 in connection with registration.

Seizure, forfeiture, and disposition are separately authorized.[163]

8.7.4.3 Administrative Penalties

The penalty for administrative violations may include denial, revocation, suspension or amendment of any license or other approval granted under the ITAR. Any application for approval under the ITAR may also be denied whenever required by any U.S. statute.[164]

8.7.5 Debarment, Suspension, and Appeals

ITAR contains provisions concerning debarment, suspension, and appeals.

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[161] 22 U.S.C. § 2778(e).
[162] 22 U.S.C. § 2778(g).
[163] 22 U.S.C. § 401.
[164] 22 C.F.R. § 126.7.

8.7.5.1 Debarment

The Assistant Secretary for Political Military Affairs may prohibit, for a period up to three years, the issuance of licenses to any person participating directly or indirectly in the export of defense articles, including technical data, or in the furnishing of a defense service. Such a prohibition is termed debarment. Such action may take place for violations, or attempted violations, of the AECA, as well as other export rules or statutes.[165]

Debarment may be either administrative or statutory. Administrative debarment is based upon any violation so serious that it is believed that the violator cannot be relied upon to comply with the controls in the future. Statutory debarment is based upon a violation of any of 11 statutes.[166]

8.7.5.2 Suspension

The Director of the Office of Defense Trade Controls may place an exporter under interim suspension if he believes that grounds for debarment exist. During this interim period, data may be gathered to determine if the exporter should be debarred. Such a suspension may not exceed 60 days, pending the initiation of proceedings.[167] Such action may be taken without prior notice or hearing. Persons subject to interim suspension may ask to be given a hearing.

8.7.5.3 Appeals

An exporter may appeal any final order denying export privileges or imposing civil penalties by filing for such an appeal within 30 days of the receipt of such notice.[168] This appeal should be filed with the Under Secretary of State for International Security Affairs.

8.7.6 Past Violations

It is the policy of the Department of State to deny applications for licenses or other requests for export that involve persons who

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[165] 22 U.S.C. § 2778(g).

[166] *Id.*

[167] 22 C.F.R. § 127.8.

[168] 22 C.F.R. § 128.13 identifies the grounds under which an appeal may be placed.

have been convicted of violating any of the enumerated U.S. criminal statutes[169] or who are ineligible to receive an export license from any agency of the U.S. government.[170]

An exception to the Department of State's policy to deny applications for past violations shall not be considered unless there are extraordinary circumstances surrounding the conviction or ineligibility to export, and only if the applicant demonstrates, to the satisfaction of the Bureau of Politico-Military Affairs, that the applicant has taken appropriate steps to mitigate any law enforcement and other legitimate concerns, and to deal with the causes that resulted in the conviction, ineligibility, or debarment.[171]

8.7.7 Recourse if Charged with a Violation

This varies, depending upon whether the proceeding is criminal or civil and, if civil, whether administrative or statutory.

A criminal proceeding is subject to the due process protections of the courts.

An administrative civil action is subject to procedures which are designed to assure due process.[172] The essential facts are divulged to the accused person in a charging letter and a response is required. There is an opportunity for an oral hearing. The accused may negotiate a settlement and propose a consent order. Any penalty may be appealed.

A statutory debarment action is not subject to these administrative procedures, except for the opportunity to appeal.

8.7.8 Authority of U.S. Customs Service — Seizures and Forfeitures

The U.S. Customs Service is a lead agency in the U.S. Government's program to block the transfer of critical U.S. technology to unfriendly countries. Customs is given the authority to control and regulate the international movement of U.S. Munitions List items that are exported.[173] This includes the right to inspect

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[169] 22 C.F.R. § 120.27.
[170] 22 C.F.R. § 127.11(a).
[171] 22 C.F.R. § 127.11(b).
[172] 22 C.F.R. § 128.
[173] 22 C.F.R. § 127.4.

the loading or unloading of any vessel, vehicle, or aircraft and shipping documentation, including hand-carried documents. Customs inspection procedures apply whether the export is authorized by a specific license, other written approval, exemption, or exception. U.S. Customs is also given authority over intransit shipments and imported items.

U.S. Customs is authorized to seize any equipment that is removed, or attempted to be removed, from the United States in violation of the law. Likewise, such equipment is also subject to forfeiture or other disposition. In order to assure that such action is not taken, an exporter must be extremely careful in the agent he selects. Many of the items seized by U.S. Customs are seized because of a failure by an agent. Such a seizure, however, affects the record of the exporter, not the agent.

Once an item is seized by U.S. Customs, the exporter will need to file the appropriate documentation, and, in most cases, pay cash in order to have the shipment released. Determination of release will be, in part, based on the previous record of violations.

In the case of exports involving classified technical data or defense articles, the Defense Investigative Service (DIS) may take appropriate action to ensure observance of the ITAR with regard to compliance with the Department of Defense Industrial Security Manual and 22 C.F.R. §§ 127.1 and 127.2. Upon request to the DIS to authorize the export of any classified defense article or technical data, the DIS official or a designated government transmittal authority may require the production of other relevant documents and information relating to the proposed export.[174]

8.7.9 Voluntary Disclosures

ITAR voluntary disclosure provisions resemble closely Commerce provisions.[175]

The Department of State strongly encourages disclosure of information to the Office of Defense Trade Controls by persons, firms or any organization that believe they may have violated any export control provision of the AECA, or any regulations,

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[174] 22 C.F.R. § 127.5.

[175] 22 C.F.R. § 127.12 and 15 C.F.R. § 764.5.

order, license, or other authorization issued under the AECA.[176] Moreover, the Department may consider voluntary self-disclosure a mitigating factor in determining the administrative penalties, if any, that should be imposed. Failure to report such violations may result in circumstances detrimental to U.S. national security and foreign policy interests.

Like the Commerce procedure, the ITAR provision specifies that a disclosure of a violation will be deemed to be a voluntary disclosure only if made prior to such time that the government obtains knowledge of the information and has commenced an investigation of its own.[177] The ITAR provision makes clear that, notwithstanding such voluntary disclosure, the activity reported could merit administrative and/or criminal penalties; and, although the Office of Defense Trade Controls will advise the Justice Department that the information was made available through a voluntary disclosure, the Justice Department is under no obligation to give that fact any weight whatsoever.[178] The Office of Defense Trade Controls has the sole discretion to consider whether a voluntary disclosure should be a mitigating factor in determining the necessary administrative action. Under 22 C.F.R. § 127.12(b)(3), the Office will take into account:

- Whether the transaction would have been authorized had proper application been made.
- Why the violation(s) occurred.
- The degree of cooperation with the ensuing investigation.
- Whether the person or firm has instituted or improved an internal compliance program to reduce the likelihood of future violation(s).
- Whether the person making the disclosure did so with full knowledge and authorization of the firm's senior management. (If not, then a firm will not be deemed to have made a disclosure as covered in this section.)[179]

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[176] 22 C.F.R. § 127.12(a).
[177] 22 C.F.R. § 127.12(b)(2).
[178] 22 C.F.R. § 127.12(b)(3).
[179] 22 C.F.R. § 127.12(b)(3).

ITAR also specifies notification, documentation, and certification requirements along with other procedural issues of a voluntary disclosure.[180]

Even a cursory examination of the voluntary disclosure section in the ITAR will lead the reader to conclude that a disclosure comporting with the requirements results in a complete waiver of the party's constitutional privilege against self-incrimination. As is true with any disclosure of this nature, therefore, one must consider whether the facts of the specific case are such that the potential benefits of voluntary disclosure are outweighed by the likelihood of administrative or criminal proceedings being commenced on the basis of that disclosure.

Because of the potential jeopardy inherent in this situation, any voluntary disclosure should be made only after consultation with experienced counsel. The issue is rarely confined to the "simple" question of whether to disclose or not. In some cases, where there are several participants in a transaction, for example, it may be feasible for one of them to make a disclosure to the U.S. Attorney and, through him, to the federal Grand Jury in exchange for immunity from prosecution. The U.S. Attorney may be willing to agree to such an arrangement if the proffered evidence helps catch the "bigger fish."

One might ask after considering these difficult questions why anyone would make a voluntary disclosure. The answer is that a voluntary disclosure may not be advisable at all in some situations. But where the violations have had little apparent impact on the foreign policy or security interests of the U.S. and the exporter has a business and a reputation to protect and, very importantly, has taken remedial measures to prevent any recurrence of the violations, then a voluntary disclosure may be appropriate.

8.8 TREASURY CONTROLS

Limits on penalties for violations of controls administered by the Office of Foreign Assets Controls (OFAC) in the Treasury Department are specified in three statutes: TWEA, IEEPA, and the Iraq Sanctions Act of 1992.

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[180] 22 C.F.R. § 127(c) through (g).

Effective October 21, 1996, penalties were adjusted for inflation.[181] They would have increased much more than they did but for the statutory limit of 10 percent increase at any one time.

8.8.1 TWEA

TWEA-based penalties apply to violations of Treasury controls on exports to North Korea, Cuba and COCOM-proscribed destinations plus Cambodia.

Section 16 of the Trading With the Enemy Act (TWEA), as amended by the Cuban Democracy Act of 1992, provides for a fine of up to $1,000,000 ($100,000 for a natural person), imprisonment up to ten years, or both, for willful violations of the Act or any license, rule, regulation, or order thereunder (31 C.F.R. §§ 500.701(a)(1) and 515.701(a)(1)). Criminal penalties provided in TWEA are subject to increase pursuant to 18 U.S.C. § 371 (31 C.F.R. §§ 500.701(b), 505.50, and 515.701(b)).

Section 16 of TWEA, as amended by the Cuban Democracy Act of 1992, permits imposition of a civil monetary penalty up to $50,000 and civil forfeiture.[182] This was increased to $55,000 on October 21, 1996. Section 16 provides that such civil penalties may not be imposed for news gathering, research, transmission of information, educational or religious activities, or activities of human rights organizations. However, persons engaged in such activities will be subject to such penalties if, after being notified that a license is required, a transaction takes place without a license.[183]

A fine up to $10,000, imprisonment up to five years, or both, may be imposed for willful false, fictitious, or fraudulent statements.[184]

8.8.2 IEEPA

The International Emergency Economic Powers Act (IEEPA) is the principal statutory basis for enforcement of Treasury controls on

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[181] To implement section 4 of the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996.

[182] 31 C.F.R. §§ 500.701(a)(3) and (4) and 515.701(a)(3) and (4).

[183] 31 C.F.R. § 515.417.

[184] 31 C.F.R. §§ 500.701(b) and 515.701(b).

exports to Libya, Iran, Serbia, Sudan, UNITA (Angola) and Taliban-controlled areas of Afghanistan.

Section 206 of IEEPA provides for a civil penalty not to exceed $10,000, increased to $11,000 on October 21, 1996, and a criminal penalty for willful violation up to $50,000 and imprisonment up to ten years or both. Any officer, director, or agency of any corporation who knowingly participates in such a willful violation may be punished by a like fine, imprisonment, or both.

Libyan regulations also cite the relevance of 18 U.S.C. § 1001.[185] Shipments may be detained under Customs laws or other applicable provision of law.[186]

8.8.3 Iraq Sanctions Act

Under the Iraq Sanctions Act, a civil penalty not to exceed $275,000 may be imposed.[187] Criminal penalties may not exceed $1,000,000 for a person other than a natural person and, if a natural person, a fine not more than $1,000,000, imprisonment not more than 12 years, or both.[188]

8.8.4 Civil Administrative Procedures

Treasury regulations for North Korea, Cuba, Libya, Iraq, UNITA (Angola), Iran, and Sudan include provisions for a pre-penalty notice, a presentation responding to the pre-penalty notice, and referral to Justice for collection when necessary.[189]

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[185] 31 C.F.R. § 550.701(b).

[186] 31 C.F.R. § 550.702.

[187] 31 C.F.R. § 575.701(a)(1).

[188] 31 C.F.R. § 575.701(a)(2).

[189] 31 C.F.R. §§ 500.702-707; 515.702-706; 500.703-706; 575.702-705; 590.702-705; 560.702-705; and 538.702-705.

APPENDIX 8-1 Extraterritorial EAA Sanctions Legislation

§2410a. Multilateral export control violations

(a) Determination by the President

The President, subject to subsection (c), shall apply sanctions under subsection (b) for a period of not less than 2 years and not more than 5 years, if the President determines that—

(1) a foreign person has violated any regulation issued by a country to control exports for national security purposes pursuant to the agreement of the group known as the Coordinating Committee, and

(2) such violation has resulted in substantial enhancement of Soviet and East bloc capabilities in submarine or antisubmarine warfare, ballistic or antiballistic missile technology, strategic aircraft, command, control, communications and intelligence, or other critical technologies as determined by the President, on the advice of the National Security Council, to represent a serious adverse impact on the strategic balance of forces.

The President shall notify the Congress of each action taken under this section. This section, except subsections (h) and (j), applies only to violations that occur after the date of the enactment of the Export Enhancement Act of 1988 [Aug. 23, 1988].

(b) Sanctions

The sanctions referred to in subsection (a) shall apply to the foreign person committing the violation, as well as to any parent, affiliate, subsidiary, and successor entity of the foreign person, and, except as provided in subsection (c), are as follows:

(1) a prohibition on contracting with, and procurement of products and services from, a sanctioned person, by any department, agency, or instrumentality of the United States Government, and

(2) a prohibition on importation into the United States of all products produced by a sanctioned person.

(c) Exceptions

The President shall not apply sanctions under this section—

(1) in the case of procurement of defense articles or defense services—

(A) under existing contracts or subcontracts, including the exercise of options for production quantities to satisfy United States operational military requirements;

(B) if the President determines that the foreign person or other entity to which the sanctions would otherwise be applied is a sole source supplier of essential defense articles or services and no alternative supplier can be identified; or

(C) if the President determines that such articles or services are essential to the national security under defense coproduction agreements; or

(2) to—

(A) products or services provided under contracts or other binding agreements (as such terms are defined by the President in regulations) entered into before the date on which the President notifies the Congress of the intention to impose the sanctions;

(B) spare parts;

(C) component parts, but not finished products, essential to United States products or production;

(D) routine servicing and maintenance of products; or

(E) information and technology.

(d) Exclusion

The President shall not apply sanctions under this section to a parent, affiliate, subsidiary, and successor entity of a foreign person if the President determines that—

(1) the parent, affiliate, subsidiary, or successor entity (as the case may be) has not knowingly violated the export control regulation violated by the foreign person, and

(2) the government of the country with jurisdiction over the parent, affiliate, subsidiary, or successor entity had in effect, at the time of the violation by the foreign person, an effective export control system consistent with principles agreed to in the Coordinating Committee, including the following:

(A) national laws providing appropriate civil and criminal penalties and statutes of limitations sufficient to deter potential violations;

(B) a program to evaluate export license applications that includes sufficient technical expertise to assess the

licensing status of exports and ensure the reliability of end-users;

(C) an enforcement mechanism that provides authority for trained enforcement officers to investigate and prevent illegal exports;

(D) a system of export control documentation to verify the movement of goods and technology; and

(E) procedures for the coordination and exchange of information concerning violations of the agreement of the Coordinating Committee.

(e) Definitions

For purposes of this section—

(1) the term "component part" means any article which is not usable for its intended functions without being imbedded in or integrated into any other product and which, if used in production of a finished product, would be substantially transformed in that process;

(2) the term "finished product" means any article which is usable for its intended functions without being imbedded or integrated into any other product, but in no case shall such term be deemed to include an article produced by a person other than a sanctioned person that contains parts or components of the sanctioned person if the parts or components have been substantially transformed during production of the finished product; and

(3) the term "sanctioned person" means a foreign person, and any parent, affiliate, subsidiary, or successor entity of the foreign person, upon whom sanctions have been imposed under this section.

(f) Subsequent modifications of sanctions

The President may, after consultation with the Congress, limit the scope of sanctions applied to a parent, affiliate, subsidiary, or successor entity of the foreign person determined to have committed the violation on account of which the sanctions were imposed if the President determines that—

(1) the parent, affiliate, subsidiary, or successor entity (as the case may be) has not, on the basis of available evidence, itself violated the export control regulation involved, either directly or through a course of conduct;

(2) the government with jurisdiction over the parent, affiliate, subsidiary, or successor entity has improved its export control system as measured by the criteria set forth in subsection (d)(2);

(3) the parent, affiliate, subsidiary, or successor entity, has instituted improvements in internal controls sufficient to detect and prevent violations of the export control regime implemented under paragraph (2); and

(4) the impact of the sanctions imposed on the parent, affiliate, subsidiary, or successor entity is proportionate to the increased defense expenditures imposed on the United States.

Notwithstanding the preceding sentence, the President may not limit the scope of the sanction referred to in subsection (b)(1) with respect to the parent of the foreign person determined to have committed the violation, until that sanction has been in effect for at least 2 years.

(g) Reports to Congress

The President shall include in the annual report submitted under section 14 [section 2413 of this Appendix], a report on the status of any sanctions imposed under this section, including any exceptions, exclusions, or modifications of sanctions that have been applied under subsection (c), (d), or (f).

(h) Discretionary imposition of sanctions

If the President determines that a foreign person has violated a regulation issued by a country to control exports for national security purposes pursuant to the agreement of the group known as the Coordinating Committee, but in a case in which subsection (a)(2) may not apply, the President may apply the sanctions referred to in subsection (b) against that foreign person for a period of not more than 5 years.

(i) Compensation for diversion of militarily critical technologies to controlled countries

(1) In cases in which sanctions have been applied against a foreign person under subsection (a), the President shall initiate discussions with the foreign person and the government with jurisdiction over that foreign person regarding compensation on the part of the foreign person in an amount proportionate to the costs of research and development and procurement of new defensive systems by the United States and the allies of the United States to counteract the

effect of the technological advance achieved by the Soviet Union as a result of the violation by that foreign person.

(2) The President shall, at the time that discussions are initiated under paragraph (1), report to the Congress that such discussions are being undertaken, and shall report to the Congress the outcome of those discussions.

(j) Other actions by the President

Upon making a determination under subsection (a) or (h), the President shall—

(1) initiate consultations with the foreign government with jurisdiction over the foreign person who committed the violation involved, in order to seek prompt remedial action by that government;

(2) initiate discussions with the governments participating in the Coordinating Committee regarding the violation and means to ensure that similar violations do not occur; and

(3) consult with and report to the Congress on the nature of the violation and the actions the President proposes to take, or has taken, to rectify the situation.

(k) Damages for certain violations

(1) In any case in which the President makes a determination under subsection (a), the Secretary of Defense shall determine the costs of restoring the military preparedness of the United States on account of the violation involved. The Secretary of Defense shall notify the Attorney General of his determination, and the Attorney General may bring an action for damages, in any appropriate district court of the United States, to recover such costs against the person who committed the violation, any person that is owned or controlled by the person who committed the violation, and any person who owns and controls the person who committed the violation.

(3) (FOOTNOTE 1) The total amount awarded in any case brought under paragraph (2) (FOOTNOTE 1) shall be determined by the court in light of the facts and circumstances, but shall not exceed the amount of the net loss to the national security of the United States. An action under this subsection shall be commenced not later than 3 years after the violation occurs, or one year after the violation is discovered, whichever is later.

(FOOTNOTE 1) So in original. Subsec. (k) was enacted without a par. (2).

(l) Definition

For purposes of this section, the term "foreign person" means any person other than a United States person.

(Pub. L. 96-72, §11A, as added Pub. L. 100-418, title II, §2444, Aug. 23, 1988, 102 Stat. 1366.)

§2410b. Missile proliferation control violations

(a) Violations by United States persons

(1) Sanctions

(A) If the President determines that a United States person knowingly —

(i) exports, transfers, or otherwise engages in the trade of any item on the MTCR Annex, in violation of the provisions of section 38 (22 U.S.C. 2778) or chapter 7 of the Arms Export Control Act [22 U.S.C. 2797 et seq.], section 5 or 6 of this Act [section 2404 or 2405 of this Appendix], or any regulations or orders issued under any such provisions,

(ii) conspires to or attempts to engage in such export, transfer, or trade, or

(iii) facilitates such export, transfer, or trade by any other person,

then the President shall impose the applicable sanctions described in subparagraph (B).

(B) The sanctions which apply to a United States person under subparagraph (A) are the following:

(i) If the item on the MTCR Annex involved in the export, transfer, or trade is missile equipment or technology within category II of the MTCR Annex, then the President shall deny to such United States person, for a period of 2 years, licenses for the transfer of missile equipment or technology controlled under this Act [sections 2401 to 2420 of this Appendix].

(ii) If the item on the MTCR Annex involved in the export, transfer, or trade is missile equipment or technology within category I of the MTCR Annex, then the President shall deny to such United States person, for a period of not less than 2 years, all licenses for items the export of which

is controlled under this Act [sections 2401 to 2420 of this Appendix].

(2) Discretionary sanctions

In the case of any determination referred to in paragraph (1), the Secretary may pursue any other appropriate penalties under section 11 of this Act [section 2410 of this Appendix].

(3) Waiver

The President may waive the imposition of sanctions under paragraph (1) on a person with respect to a product or service if the President certifies to the Congress that—

(A) the product or service is essential to the national security of the United States; and

(B) such person is a sole source supplier of the product or service, the product or service is not available from any alternative reliable supplier, and the need for the product or service cannot be met in a timely manner by improved manufacturing processes or technological developments.

(b) Transfers of missile equipment or technology by foreign persons

(1) Sanctions

(A) Subject to paragraphs (3) through (7), if the President determines that a foreign person, after the date of the enactment of this section [Nov. 5, 1990], knowingly—

(i) exports, transfers, or otherwise engages in the trade of any MTCR equipment or technology that contributes to the design, development, or production of missiles in a country that is not an MTCR adherent and would be, if it were United States-origin equipment or technology, subject to the jurisdiction of the United States under this Act [sections 2401 to 2420 of this Appendix],

(ii) conspires to or attempts to engage in such export, transfer, or trade, or

(iii) facilitates such export, transfer, or trade by any other person,

or if the President has made a determination with respect to a foreign person under section 73(a) of the Arms Export Control Act [22 U.S.C. 2797b(a)], then the President shall impose on that foreign person the applicable sanctions under subparagraph (B).

(B) The sanctions which apply to a foreign person under subparagraph (A) are the following:

(i) If the item involved in the export, transfer, or trade is within category II of the MTCR Annex, then the President shall deny, for a period of 2 years, licenses for the transfer to such foreign person of missile equipment or technology the export of which is controlled under this Act [sections 2401 to 2420 of this Appendix].

(ii) If the item involved in the export, transfer, or trade is within category I of the MTCR Annex, then the President shall deny, for a period of not less than 2 years, licenses for the transfer to such foreign person of items the export of which is controlled under this Act [sections 2401 to 2420 of this Appendix].

(iii) If, in addition to actions taken under clauses (i) and (ii), the President determines that the export, transfer, or trade has substantially contributed to the design, development, or production of missiles in a country that is not an MTCR adherent, then the President shall prohibit, for a period of not less than 2 years, the importation into the United States of products produced by that foreign person.

(2) Inapplicability with respect to MTCR adherents

Paragraph (1) does not apply with respect to—

(A) any export, transfer, or trading activity that is authorized by the laws of an MTCR adherent, if such authorization is not obtained by misrepresentation or fraud; or

(B) any export, transfer, or trade of an item to an end user in a country that is an MTCR adherent.

(3) Effect of enforcement actions by MTCR adherents

Sanctions set forth in paragraph (1) may not be imposed under this subsection on a person with respect to acts described in such paragraph or, if such sanctions are in effect against a person on account of such acts, such sanctions shall be terminated, if an MTCR adherent is taking judicial or other enforcement action against that person with respect to such acts, or that person has been found by the government of an MTCR adherent to be innocent of wrongdoing with respect to such acts.

(4) Advisory opinions

The Secretary, in consultation with the Secretary of State and the Secretary of Defense, may, upon the request of any person, issue an advisory opinion to that person as to whether a proposed activity by that person would subject that person to sanctions under this

subsection. Any person who relies in good faith on such an advisory opinion which states that the proposed activity would not subject a person to such sanctions, and any person who thereafter engages in such activity, may not be made subject to such sanctions on account of such activity.

(5) Waiver and report to Congress

(A) In any case other than one in which an advisory opinion has been issued under paragraph (4) stating that a proposed activity would not subject a person to sanctions under this subsection, the President may waive the application of paragraph (1) to a foreign person if the President determines that such waiver is essential to the national security of the United States.

(B) In the event that the President decides to apply the waiver described in subparagraph (A), the President shall so notify the Congress not less than 20 working days before issuing the waiver. Such notification shall include a report fully articulating the rationale and circumstances which led the President to apply the waiver.

(6) Additional waiver

The President may waive the imposition of sanctions under paragraph (1) on a person with respect to a product or service if the President certifies to the Congress that—

(A) the product or service is essential to the national security of the United States; and

(B) such person is a sole source supplier of the product or service, the product or service is not available from any alternative reliable supplier, and the need for the product or service cannot be met in a timely manner by improved manufacturing processes or technological developments.

(7) Exceptions

The President shall not apply the sanction under this subsection prohibiting the importation of the products of a foreign person—

(A) in the case of procurement of defense articles or defense services—

(i) under existing contracts or subcontracts, including the exercise of options for production quantities to satisfy requirements essential to the national security of the United States;

(ii) if the President determines that the person to which the sanctions would be applied is a sole source supplier of the defense articles and services, that the defense articles or services are essential to the national security of the United States, and that alternative sources are not readily or reasonably available; or

(iii) if the President determines that such articles or services are essential to the national security of the United States under defense coproduction agreements or NATO Programs of Cooperation;

(B) to products or services provided under contracts entered into before the date on which the President publishes his intention to impose the sanctions; or

(C) to —

(i) spare parts,

(ii) component parts, but not finished products, essential to United States products or production,

(iii) routine services and maintenance of products, to the extent that alternative sources are not readily or reasonably available, or

(iv) information and technology essential to United States products or production.

(c) Definitions

For purposes of this section and subsections (k) and (l) of section 6 [section 2405(k) and (l) of this Appendix] —

(1) the term "missile" means a category I system as defined in the MTCR Annex, and any other unmanned delivery system of similar capability, as well as the specially designed production facilities for these systems;

(2) the term "Missile Technology Control Regime" or "MTCR" means the policy statement, between the United States, the United Kingdom, the Federal Republic of Germany, France, Italy, Canada, and Japan, announced on April 16, 1987, to restrict sensitive missile-relevant transfers based on the MTCR Annex, and any amendments thereto;

(3) the term "MTCR adherent" means a country that participates in the MTCR or that, pursuant to an international understanding to which the United States is a party, controls MTCR equipment or technology in accordance with the criteria and standards set forth in the MTCR;

(4) the term "MTCR Annex" means the Guidelines and Equipment and Technology Annex of the MTCR, and any amendments thereto;

(5) the terms "missile equipment or technology" and "MTCR equipment or technology" mean those items listed in category I or category II of the MTCR Annex;

(6) the term "foreign person" means any person other than a United States person;

(7)(A) the term "person" means a natural person as well as a corporation, business association, partnership, society, trust, any other nongovernmental entity, organization, or group, and any governmental entity operating as a business enterprise, and any successor of any such entity; and

(B) in the case of countries where it may be impossible to identify a specific governmental entity referred to in subparagraph (A), the term "person" means —

(i) all activities of that government relating to the development or production of any missile equipment or technology; and

(ii) all activities of that government affecting the development or production of aircraft, electronics, and space systems or equipment; and

(8) the term "otherwise engaged in the trade of" means, with respect to a particular export or transfer, to be a freight forwarder or designated exporting agent, or a consignee or end user of the item to be exported or transferred.

(Pub. L. 96-72, §11B, as added Pub. L. 101-510, div. A, title XVII, § 1702(b), Nov. 5, 1990, 104 Stat. 1741.)

§ 2410c. Chemical and biological weapons proliferation sanctions

(a) Imposition of sanctions

(1) Determination by the President

Except as provided in subsection (b)(2), the President shall impose both of the sanctions described in subsection (c) if the President determines that a foreign person, on or after October 28, 1991, has knowingly and materially contributed —

(A) through the export from the United States of any goods or technology that are subject to the jurisdiction of the United States under this Act [sections 2401 to 2420 of this Appendix], or

(B) through the export from any other country of any goods or technology that would be, if they were United States goods or technology, subject to the jurisdiction of the United States under this Act [sections 2401 to 2420 of this Appendix],

to the efforts by any foreign country, project, or entity described in paragraph (2) to use, develop, produce, stockpile, or otherwise acquire chemical or biological weapons.

(2) Countries, projects, or entities receiving assistance

Paragraph (1) applies in the case of—

(A) any foreign country that the President determines has, at any time after January 1, 1980—

(i) used chemical or biological weapons in violation of international law;

(ii) used lethal chemical or biological weapons against its own nationals; or

(iii) made substantial preparations to engage in the activities described in clause (i) or (ii);

(B) any foreign country whose government is determined for purposes of section 6(j) of this Act [section 2405(j) of this Appendix] to be a government that has repeatedly provided support for acts of international terrorism; or

(C) any other foreign country, project, or entity designated by the President for purposes of this section.

(3) Persons against which sanctions are to be imposed

Sanctions shall be imposed pursuant to paragraph (1) on—

(A) the foreign person with respect to which the President makes the determination described in that paragraph;

(B) any successor entity to that foreign person;

(C) any foreign person that is a parent or subsidiary of that foreign person if that parent or subsidiary knowingly assisted in the activities which were the basis of that determination; and

(D) any foreign person that is an affiliate of that foreign person if that affiliate knowingly assisted in the activities which were the basis of that determination and if that affiliate is controlled in fact by that foreign person.

(b) Consultations with and actions by foreign government of jurisdiction

(1) Consultations

If the President makes the determinations described in subsection (a)(1) with respect to a foreign person, the Congress urges the President to initiate consultations immediately with the government with primary jurisdiction over that foreign person with respect to the imposition of sanctions pursuant to this section.

(2) Actions by government of jurisdiction

In order to pursue such consultations with that government, the President may delay imposition of sanctions pursuant to this section for a period of up to 90 days. Following these consultations, the President shall impose sanctions unless the President determines and certifies to the Congress that government has taken specific and effective actions, including appropriate penalties, to terminate the involvement of the foreign person in the activities described in subsection (a)(1). The President may delay imposition of sanctions for an additional period of up to 90 days if the President determines and certifies to the Congress that government is in the process of taking the actions described in the preceding sentence.

(3) Report to Congress

The President shall report to the Congress, not later than 90 days after making a determination under subsection (a)(1), on the status of consultations with the appropriate government under this subsection, and the basis for any determination under paragraph (2) of this subsection that such government has taken specific corrective actions.

(c) Sanctions

(1) Description of sanctions

The sanctions to be imposed pursuant to subsection (a)(1) are, except as provided in paragraph (2) of this subsection, the following:

(A) Procurement sanction

The United States Government shall not procure, or enter into any contract for the procurement of, any goods or services from any person described in subsection (a)(3).

(B) Import sanctions

The importation into the United States of products produced by any person described in subsection (a)(3) shall be prohibited.

(2) Exceptions

The President shall not be required to apply or maintain sanctions under this section—

(A) in the case of procurement of defense articles or defense services—

(i) under existing contracts or subcontracts, including the exercise of options for production quantities to satisfy United States operational military requirements;

(ii) if the President determines that the person or other entity to which the sanctions would otherwise be applied is a sole source supplier of the defense articles or services, that the defense articles or services are essential, and that alternative sources are not readily or reasonably available; or

(iii) if the President determines that such articles or services are essential to the national security under defense coproduction agreements;

(B) to products or services provided under contracts entered into before the date on which the President publishes his intention to impose sanctions;

(C) to—

(i) spare parts,

(ii) component parts, but not finished products, essential to United States products or production, or

(iii) routine servicing and maintenance of products, to the extent that alternative sources are not readily or reasonably available;

(D) to information and technology essential to United States products or production; or

(E) to medical or other humanitarian items.

(d) Termination of sanctions

The sanctions imposed pursuant to this section shall apply for a period of at least 12 months following the imposition of sanctions and shall cease to apply thereafter only if the President determines and certifies to the Congress that reliable information indicates that the foreign person with respect to which the determination was made under subsection (a)(1) has ceased to aid or abet any foreign government, project, or entity in its efforts to acquire chemical or biological weapons capability as described in that subsection.

(e) Waiver

(1) Criterion for waiver

The President may waive the application of any sanction imposed on any person pursuant to this section, after the end of the 12-month period beginning on the date on which that sanction

was imposed on that person, if the President determines and certifies to the Congress that such waiver is important to the national security interests of the United States.

(2) Notification of and report to Congress

If the President decides to exercise the waiver authority provided in paragraph (1), the President shall so notify the Congress not less than 20 days before the waiver takes effect. Such notification shall include a report fully articulating the rationale and circumstances which led the President to exercise the waiver authority.

(f) Definition of foreign person

For the purposes of this section, the term "foreign person" means —

(1) an individual who is not a citizen of the United States or an alien admitted for permanent residence to the United States; or

(2) a corporation, partnership, or other entity which is created or organized under the laws of a foreign country or which has its principal place of business outside the United States.

(Pub. L. 96-72, § 11C, as added and amended Pub. L. 102-182, title III, § 305(a), 309(b)(1), Dec. 4, 1991, 105 Stat. 1247, 1258.)

APPENDIX 8-2 Extraterritorial NPPA Sanctions Legislation

TITLE VIII — NUCLEAR PROLIFERATION PREVENTION ACT

Nuclear Proliferation Prevention Act of 1994.

SEC. 801. SHORT TITLE.

22 USC 3201 note.

This title may be cited as the "Nuclear Proliferation Prevention Act of 1994".

PART A — REPORTING ON NUCLEAR EXPORTS

SEC. 811. REPORTS TO CONGRESS.

Section 601(a) of the Nuclear Non-Proliferation Act of 1978 (22 U.S.C. 3281(a)) is amended—

(1) in paragraph (4), by striking "and" after the semicolon;

(2) in paragraph (5), by striking the period and inserting a semicolon; and

(3) by adding after paragraph (5) the following:

"(6) a description of the implementation of nuclear and nuclear-related dual-use export controls in the preceding calendar year, including a summary by type of commodity and destination of—

"(A) all transactions for which—

"(i) an export license was issued for any good controlled under section 309(c) of this Act;

"(ii) an export license was issued under section 109 b. of the 1954 Act;

"(iii) approvals were issued under the Export Administration Act of 1979, or section 109 b.(3) of the 1954 Act, for the retransfer of any item, technical data, component, or substance; or

"(iv) authorizations were made as required by section 57 b.(2) of the 1954 Act to engage, directly or indirectly, in the production of special nuclear material;

"(B) each instance in which —

"(i) a sanction has been imposed under section 821(a) or section 824 of the Nuclear Proliferation Prevention Act of 1994 or section 102(b)(1) of the Arms Export Control Act;

"(ii) sales or leases have been denied under section 3(f) of the Arms Export Control Act or transactions prohibited by reason of acts relating to proliferation of nuclear explosive devices as described in section 40(d) of that Act;

"(iii) a sanction has not been imposed by reason of section 821(c)(2) of the Nuclear Proliferation Prevention Act of 1994 or the imposition of a sanction has been delayed under section 102(b)(4) of the Arms Export Control Act; or

"(iv) a waiver of a sanction has been made under —

"(I) section 821(f) or section 824 of the Nuclear Proliferation Prevention Act of 1994,

"(II) section 620E(d) of the Foreign Assistance Act of 1961, or paragraph (5) or (6)(B) of section 102(b) of the Arms Export Control Act,

"(III) section 40(g) of the Arms Export Control Act with respect to the last sentence of section 40(d) of that Act, or

"(IV) section 614 of the Foreign Assistance Act of 1961 with respect to section 620E of that Act or section 3(f), the last sentence of section 40(d), or 102(b)(1) of the Arms Export Control Act; and

"(C) the progress of those independent states of the former Soviet Union that are non-nuclear-weapon states and of the Baltic

states towards achieving the objective of applying full scope safeguards to all their peaceful nuclear activities.

Portions of the information required by paragraph (6) may be submitted in classified form, as necessary. Any such information that may not be published or disclosed under section 12(c)(1) of the Export Administration Act of 1979 shall be submitted as confidential.".

PART B — SANCTIONS FOR NUCLEAR PROLIFERATION

22 USC 3201 note.

SEC. 821. IMPOSITION OF PROCUREMENT SANCTION ON PERSONS ENGAGING IN EXPORT ACTIVITIES THAT CONTRIBUTE TO PROLIFERATION.

(a) DETERMINATION BY THE PRESIDENT. —

(1) IN GENERAL. — Except as provided in subsection (b)(2), the President shall impose the sanction described in subsection (c) if the President determines in writing that, on or after the effective date of this part, a foreign person or a United States person has materially and with requisite knowledge contributed, through the export from the United States or any other country of any goods or technology (as defined in section 830(2)), to the efforts by any individual, group, or non-nuclear-weapon state to acquire unsafeguarded special nuclear material or to use, develop, produce, stockpile, or otherwise acquire any nuclear explosive device.

(2) PERSONS AGAINST WHICH THE SANCTION IS TO BE IMPOSED. — The sanction shall be imposed pursuant to paragraph (1) on —

(A) the foreign person or United States person with respect to which the President makes the determination described in that paragraph;

(B) any successor entity to that foreign person or United States person;

(C) any foreign person or United States person that is a parent or subsidiary of that person if that parent or subsidiary materially and with requisite knowledge assisted in the activities which were the basis of that determination; and

(D) any foreign person or United States person that is an affiliate of that person if that affiliate materially and with requisite knowledge assisted in the activities which were the basis of that determination and if that affiliate is controlled in fact by that person.

(3) OTHER SANCTIONS AVAILABLE. — The sanction which is required to be imposed for activities described in this subsection is in addition to any other sanction which may be imposed for the same activities under any other provision of law.

(4) DEFINITION. — For purposes of this subsection, the term "requisite knowledge" means situations in which a person "knows", as "knowing" is defined in section 104 of the Foreign Corrupt Practices Act of 1977 (15 U.S.C. 78dd-2).

(b) CONSULTATION WITH AND ACTIONS BY FOREIGN GOVERNMENT OF JURISDICTION. —

(1) CONSULTATIONS. — If the President makes a determination described in subsection (a)(1) with respect to a foreign person, the Congress urges the President to initiate consultations immediately with the government with primary jurisdiction over that foreign person with respect to the imposition of the sanction pursuant to this section.

(2) ACTIONS BY GOVERNMENT OF JURISDICTION. — In order to pursue such consultations with that government, the President may delay

imposition of the sanction pursuant to this section for up to 90 days. Following these consultations, the President shall impose the sanction unless the President determines and certifies in writing to the Congress that that government has taken specific and effective actions, including appropriate penalties, to terminate the involvement of the foreign person in the activities described in subsection (a)(1). The President may delay the imposition of the sanction for up to an additional 90 days if the President determines and certifies in writing to the Congress that that government is in the process of taking the actions described in the preceding sentence. President

(3) REPORT TO CONGRESS.—Not later than 90 days after making a determination under subsection (a)(1), the President shall submit to the Committee on Foreign Relations and the Committee on Governmental Affairs of the Senate and the Committee on Foreign Affairs of the House of Representatives a report on the status of consultations with the appropriate government under this subsection, and the basis for any determination under paragraph (2) of this subsection that such government has taken specific corrective actions. President

(c) SANCTION.—

(1) DESCRIPTION OF SANCTION.—The sanction to be imposed pursuant to subsection (a)(1) is, except as provided in paragraph (2) of this subsection, that the United States Government shall not procure, or enter into any contract for the procurement of, any goods or services from any person described in subsection (a)(2).

(2) EXCEPTIONS.—The President shall not be required to apply or maintain the sanction under this section—

(A) in the case of procurement of defense articles or defense services—

(i) under existing contracts or subcontracts, including the exercise of options for production quantities to satisfy requirements essential to the national security of the United States;

(ii) if the President determines in writing that the person or other entity to which the sanction would otherwise be applied is a sole source supplier of the defense articles or services, that the defense articles or services are essential, and that alternative sources are not readily or reasonably available; or

(iii) if the President determines in writing that such articles or services are essential to the national security under defense coproduction agreements;

(B) to products or services provided under contracts entered into before the date on which the President publishes his intention to impose the sanction;

(C) to—

(i) spare parts which are essential to United States products or production;

(ii) component parts, but not finished products, essential to United States products or production; or

(iii) routine servicing and maintenance of products, to the extent that alternative sources are not readily or reasonably available;

(D) to information and technology essential to United States products or production; or

(E) to medical or other humanitarian items.

(d) ADVISORY OPINIONS.—Upon the request of any person, the Secretary of State may, in consultation with the Secretary of Defense, issue in writing an advisory opinion to that person as to whether a proposed

activity by that person would subject that person to the sanction under this section. Any person who relies in good faith on such an advisory opinion which states that the proposed activity would not subject a person to such sanction, and any person who thereafter engages in such activity, may not be made subject to such sanction on account of such activity.

(e) TERMINATION OF THE SANCTION. — The sanction imposed pursuant to this section shall apply for a period of at least 12 months following the imposition of the sanction and shall cease to apply thereafter only if the President determines and certifies in writing to the Congress that —

(1) reliable information indicates that the foreign person or United States person with respect to which the determination was made under subsection (a)(1) has ceased to aid or abet any individual, group, or non-nuclear-weapon state in its efforts to acquire unsafeguarded special nuclear material or any nuclear explosive device, as described in that subsection; and

(2) the President has received reliable assurances from the foreign person or United States person, as the case may be, that such person will not, in the future, aid or abet any individual, group, or non-nuclear-weapon state in its efforts to acquire unsafeguarded special nuclear material or any nuclear explosive device, as described in subsection (a)(1).

(f) WAIVER. —

(1) CRITERION FOR WAIVER. — The President may waive the application of the sanction imposed on any person pursuant to this section, after the end of the 12-month period beginning on the date on which that sanction was imposed on that person, if the President determines and certifies in writing to the Congress that the continued imposition of the sanction

would have a serious adverse effect on vital United States interests.

(2) NOTIFICATION OF AND REPORT TO CONGRESS. — If the President decides to exercise the waiver authority provided in paragraph (1), the President shall so notify the Congress not less than 20 days before the waiver takes effect. Such notification shall include a report fully articulating the rationale and circumstances which led the President to exercise the waiver authority.

SEC. 822. ELIGIBILITY FOR ASSISTANCE.

(a) AMENDMENTS TO THE ARMS EXPORT CONTROL ACT. —

(1) PROHIBITION. — Section 3 of the Arms Export Control Act (22 U.S.C. 2753) is amended by adding at the end the following new subsection:

"(f) No sales or leases shall be made to any country that the President has determined is in material breach of its binding commitments to the United States under international treaties or agreements concerning the nonproliferation of nuclear explosive devices (as defined in section 830(4) of the Nuclear Proliferation Prevention Act of 1994) and unsafeguarded special nuclear material (as defined in section 830(8) of that Act).".

(2) DEFINITION OF SUPPORT FOR INTERNATIONAL TERRORISM. — Section 40 of such Act (22 U.S.C. 2780) is amended —

(A) in subsection (d), by adding at the end the following new sentence: "For purposes of this subsection, such acts shall include all activities that the Secretary determines willfully aid or abet the international proliferation of nuclear explosive devices to individuals or groups or willfully aid or abet an individual or groups

in acquiring unsafeguarded special nuclear material."; and

(B) in subsection (l)—

(i) in paragraph (2), by striking 'and' after the semicolon;

(ii) in paragraph (3), by striking the period at the end and inserting a semicolon; and

(iii) by adding at the end the following:

"(4) the term 'nuclear explosive device' has the meaning given that term in section 830(4) of the Nuclear Proliferation Prevention Act of 1994; and

"(5) the term 'unsafeguarded special nuclear material' has the meaning given that term in section 830(8) of the Nuclear Proliferation Prevention Act of 1994.".

(b) FOREIGN ASSISTANCE ACT OF 1961.—

(1) PRESIDENTIAL DETERMINATION 82–7.—Notwithstanding any other provision of law, Presidential Determination No. 82–7 of February 10, 1982, made pursuant to section 670(a)(2) of the Foreign Assistance Act of 1961, shall have no force or effect with respect to any grounds for the prohibition of assistance under section 102(a)(1) of the Arms Export Control Act arising on or after the effective date of this part.

(2) AMENDMENT.—Section 620E(d) of the Foreign Assistance Act of 1961 (22 U.S.C. 2375(d)) is amended to read as follows:

"(d) The President may waive the prohibitions of section 101 of the Arms Export Control Act with respect to any grounds for the prohibition of assistance under that section arising before the effective date of part B of the Nuclear Proliferation Prevention Act of 1994 to provide assistance to Pakistan if he determines that to do so is in the national interest of the United States.".

SEC. 823. ROLE OF INTERNATIONAL FINANCIAL INSTITUTIONS.

(a) IN GENERAL. — The Secretary of the Treasury shall instruct the United States executive director to each of the international financial institutions described in section 701(a) of the International Financial Institutions Act (22 U.S.C. 262d(a)) to use the voice and vote of the United States to oppose any use of the institution's funds to promote the acquisition of unsafeguarded special nuclear material or the development, stockpiling, or use of any nuclear explosive device by any non-nuclear-weapon state.

(b) DUTIES OF UNITED STATES EXECUTIVE DIRECTORS. — Section 701(b)(3) of the International Financial Institutions Act (22 U.S.C. 262d(b)(3)) is amended to read as follows:

"(3) whether the recipient country —

"(A) is seeking to acquire unsafeguarded special nuclear material (as defined in section 830(8) of the Nuclear Proliferation Prevention Act of 1994) or a nuclear explosive device (as defined in section 830(4) of that Act);

"(B) is not a State Party to the Treaty on the Non-Proliferation of Nuclear Weapons; or

"(C) has detonated a nuclear explosive device; and".

SEC. 824. PROHIBITION ON ASSISTING NUCLEAR PROLIFERATION THROUGH THE PROVISION OF FINANCING.

(a) PROHIBITED ACTIVITY DEFINED. — For purposes of this section, the term "prohibited activity" means the act of knowingly, materially, and directly contributing or attempting to contribute, through the provision of financing, to —

(1) the acquisition of unsafeguarded special nuclear material; or

(2) the use, development, production, stockpiling, or other acquisition of any nuclear explosive device, by any individual, group, or non-nuclear-weapon state.

(b) PROHIBITION. — To the extent that the United States has jurisdiction to prohibit such activity by such person, no United States person and no foreign person may engage in any prohibited activity.

(c) PRESIDENTIAL DETERMINATION AND ORDER WITH RESPECT TO UNITED STATES AND FOREIGN PERSONS. — If the President determines, in writing after opportunity for a hearing on the record, that a United States person or a foreign person has engaged in a prohibited activity (without regard to whether subsection (b) applies), the President shall, by order, impose the sanctions described in subsection (d) on such person.

(d) SANCTIONS. — The following sanctions shall be imposed pursuant to any order issued under subsection (c) with respect to any United States person or any foreign person:

(1) BAN ON DEALINGS IN GOVERNMENT FINANCE. —

(A) DESIGNATION AS PRIMARY DEALER. — Neither the Board of Governors of the Federal Reserve System nor the Federal Reserve Bank of New York may designate, or permit the continuation of any prior designation of, the person as a primary dealer in United States Government debt instruments.

(B) SERVICE AS DEPOSITARY. — The person may not serve as a depositary for United States Government funds.

(2) RESTRICTIONS ON OPERATIONS. — The person may not, directly or indirectly —

(A) commence any line of business in the United States in which the person

was not engaged as of the date of the order; or

(B) conduct business from any location in the United States at which the person did not conduct business as of the date of the order.

(e) JUDICIAL REVIEW. — Any determination of the President under subsection (c) shall be subject to judicial review in accordance with chapter 7 of part I of title 5, United States Code.

(f) CONSULTATION WITH AND ACTIONS BY FOREIGN GOVERNMENT OF JURISDICTION. —

(1) CONSULTATIONS. — If the President makes a determination under subsection (c) with respect to a foreign person, the Congress urges the President to initiate consultations immediately with any appropriate foreign government with respect to the imposition of any sanction pursuant to this section.

(2) ACTIONS BY GOVERNMENT OF JURISDICTION. —

(A) SUSPENSION OF PERIOD FOR IMPOSING SANCTIONS. — In order to pursue consultations described in paragraph (1) with any government referred to in such paragraph, the President may delay, for up to 90 days, the effective date of an order under subsection (c) imposing any sanction.

(B) COORDINATION WITH ACTIVITIES OF FOREIGN GOVERNMENT. — Following consultations described in paragraph (1), the order issued by the President under subsection (c) imposing any sanction on a foreign person shall take effect unless the President determines, and certifies in writing to the Congress, that the government referred to in paragraph (1) has taken specific and effective

actions, including the imposition of appropriate penalties, to terminate the involvement of the foreign person in any prohibited activity.

(C) EXTENSION OF PERIOD. — After the end of the period described in subparagraph (A), the President may delay, for up to an additional 90 days, the effective date of an order issued under subsection (b) imposing any sanction on a foreign person if the President determines, and certifies in writing to the Congress, that the appropriate foreign government is in the process of taking actions described in subparagraph (B).

(3) REPORT TO CONGRESS. — Before the end of the 90-day period beginning on the date on which an order is issued under subsection (c), the President shall submit to the Congress a report on —

(A) the status of consultations under this subsection with the government referred to in paragraph (1); and

(B) the basis for any determination under paragraph (2) that such government has taken specific corrective actions.

(g) TERMINATION OF THE SANCTIONS. — Any sanction imposed on any person pursuant to an order issued under subsection (c) shall —

(1) remain in effect for a period of not less than 12 months; and

(2) cease to apply after the end of such 12-month period only if the President determines, and certifies in writing to the Congress, that —

(A) the person has ceased to engage in any prohibited activity; and

(B) the President has received reliable assurances from such person that the person will not, in the future, engage in any prohibited activity.

(h) WAIVER. — The President may waive the continued application of any sanction imposed on any person pursuant to an order issued under subsection (c) if the President determines, and certifies in writing to the Congress, that the continued imposition of the sanction would have a serious adverse effect on the safety and soundness of the domestic or international financial system or on domestic or international payments systems.

(i) ENFORCEMENT ACTION. — The Attorney General may bring an action in an appropriate district court of the United States for injunctive and other appropriate relief with respect to —

(1) any violation of subsection (b); or

(2) any order issued pursuant to subsection (c).

(j) KNOWINGLY DEFINED. —

(1) IN GENERAL. — For purposes of this section, the term "knowingly" means the state of mind of a person with respect to conduct, a circumstance, or a result in which —

(A) such person is aware that such person is engaging in such conduct, that such circumstance exists, or that such result is substantially certain to occur; or

(B) such person has a firm belief that such circumstance exists or that such result is substantially certain to occur.

(2) KNOWLEDGE OF THE EXISTENCE OF A PARTICULAR CIRCUMSTANCE. — If knowledge of the existence of a particular circumstance is required for an offense, such knowledge is established if a person is aware of a high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist.

(k) SCOPE OF APPLICATION. — This section shall apply with respect to prohibited activities which occur on or after the date this part takes effect.

SEC. 825. EXPORT-IMPORT BANK.

Section 2(b)(4) of the Export-Import Bank Act of 1945 (12 U.S.C. 635(b)(4)) is amended in the first sentence by inserting after "device" the following: "(as defined in section 830(4) of the Nuclear Proliferation Prevention Act of 1994), or that any country has willfully aided or abetted any non-nuclear-weapon state (as defined in section 830(5) of that Act) to acquire any such nuclear explosive device or to acquire unsafeguarded special nuclear material (as defined in section 830(8) of that Act).".

SEC. 826. AMENDMENT TO THE ARMS EXPORT CONTROL ACT.

(a) IN GENERAL.—The Arms Export Control Act is amended by adding at the end the following new chapter:

"CHAPTER 10—NUCLEAR NONPROLIFERATION CONTROLS

"SEC. 101. NUCLEAR ENRICHMENT TRANSFERS.

22 USC 2799aa

"(a) PROHIBITIONS; SAFEGUARDS AND MANAGEMENT.—Except as provided in subsection (b) of this section, no funds made available to carry out the Foreign Assistance Act of 1961 or this Act may be used for the purpose of providing economic assistance (including assistance under chapter 4 of part II of the Foreign Assistance Act of 1961), providing military assistance or grant military education and training, providing assistance under chapter 6 of part II of that Act, or extending military credits or making guarantees, to any country which the President determines delivers nuclear enrichment equipment, materials, or technology to any other country on or after August 4, 1977, or receives such equipment, materials, or technology from any other country on or after August 4, 1977, unless before such delivery—

"(1) the supplying country and receiving country have reached agreement to place all such equipment, materials, or technology, upon delivery, under multilateral auspices and management when available; and

"(2) the recipient country has entered into an agreement with the International Atomic Energy Agency to place all such equipment, materials, technology, and all nuclear fuel and facilities in such country under the safeguards system of such Agency.

"(b) CERTIFICATION BY PRESIDENT OF NECESSITY OF CONTINUED ASSISTANCE; DISAPPROVAL BY CONGRESS.—(1) Notwithstanding subsection (a) of this section, the President may furnish assistance which would otherwise be prohibited under such subsection if he determines and certifies in writing to the Speaker of the House of Representatives and the Committee on Foreign Relations of the Senate that—

"(A) the termination of such assistance would have a serious adverse effect on vital United States interests; and

"(B) he has received reliable assurances that the country in question will not acquire or develop nuclear weapons or assist other nations in doing so.

Such certification shall set forth the reasons supporting such determination in each particular case.

"(2)(A) A certification under paragraph (1) of this subsection shall take effect on the date on which the certification is received by the Congress. However, if, within thirty calendar days after receiving this certification, the Congress enacts a joint resolution stating in substance that the Congress disapproves the furnishing of assistance pursuant to the certification, then upon the enactment of that resolution the certification shall cease to be effective and all deliveries of assistance furnished under the authority of that certification shall be suspended immediately.

"(B) Any joint resolution under this paragraph shall be considered in the Senate in accordance with the provisions of section 601(b) of the International Security Assistance and Arms Export Control Act of 1976.

President
22 USC
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"SEC. 102. NUCLEAR REPROCESSING TRANSFERS, ILLEGAL EXPORTS FOR NUCLEAR EXPLOSIVE DEVICES, TRANSFERS OF NUCLEAR EXPLOSIVE DEVICES, AND NUCLEAR DETONATIONS.

"(a) PROHIBITIONS ON ASSISTANCE TO COUNTRIES INVOLVED IN TRANSFER OF NUCLEAR REPROCESSING EQUIPMENT, MATERIALS, OR TECHNOLOGY; EXCEPTIONS; PROCEDURES APPLICABLE.—(1) Except as provided in paragraph (2) of this subsection, no funds made available to carry out the Foreign Assistance Act of 1961 or this Act may be used for the purpose of providing economic assistance (including assistance under chapter 4 of part II of the Foreign Assistance Act of 1961), providing military assistance or grant military education and training, providing assistance under chapter 6 of part II of that Act, or extending military credits or making guarantees, to any country which the President determines—

"(A) delivers nuclear reprocessing equipment, materials, or technology to any other country on or after August 4, 1977, or receives such equipment, materials, or technology from any other country on or after August 4, 1977 (except for the transfer of reprocessing technology associated with the investigation, under international evaluation programs in which the United States participates, of technologies which are alternatives to pure plutonium reprocessing), or

"(B) is a non-nuclear-weapon state which, on or after August 8, 1985, exports illegally (or attempts to export illegally) from the United States any material, equipment, or technology

which would contribute significantly to the ability of such country to manufacture a nuclear explosive device, if the President determines that the material, equipment, or technology was to be used by such country in the manufacture of a nuclear explosive device.

For purposes of clause (B), an export (or attempted export) by a person who is an agent of, or is otherwise acting on behalf of or in the interests of, a country shall be considered to be an export (or attempted export) by that country.

"(2) Notwithstanding paragraph (1) of this subsection, the President in any fiscal year may furnish assistance which would otherwise be prohibited under that paragraph if he determines and certifies in writing during that fiscal year to the Speaker of the House of Representatives and the Committee on Foreign Relations of the Senate that the termination of such assistance would be seriously prejudicial to the achievement of United States nonproliferation objectives or otherwise jeopardize the common defense and security. The President shall transmit with such certification a statement setting forth the specific reasons therefor.

"(3)(A) A certification under paragraph (2) of this subsection shall take effect on the date on which the certification is received by the Congress. However, if, within 30 calendar days after receiving this certification, the Congress enacts a joint resolution stating in substance that the Congress disapproves the furnishing of assistance pursuant to the certification, then upon the enactment of that resolution the certification shall cease to be effective and all deliveries of assistance furnished under the authority of that certification shall be suspended immediately.

"(B) Any joint resolution under this paragraph shall be considered in the Senate in accordance with the provisions of section 601(b) of the International Security Assistance and Arms Export Control Act of 1976.

"(b) PROHIBITIONS ON ASSISTANCE TO COUNTRIES INVOLVED IN TRANSFER OR USE OF NUCLEAR EXPLOSIVE DEVICES; EXCEPTIONS; PROCEDURES APPLICABLE.—(1) Except as provided in paragraphs (4), (5), and (6), in the event that the President determines that any country, after the effective date of part B of the Nuclear Proliferation Prevention Act of 1994—

"(A) transfers to a non-nuclear-weapon state a nuclear explosive device,

"(B) is a non-nuclear-weapon state and either—

"(i) receives a nuclear explosive device, or

"(ii) detonates a nuclear explosive device,

"(C) transfers to a non-nuclear-weapon state any design information or component which is determined by the President to be important to, and known by the transferring country to be intended by the recipient state for use in, the development or manufacture of any nuclear explosive device, or

"(D) is a non-nuclear-weapon state and seeks and receives any design information or component which is determined by the President to be important to, and intended by the recipient state for use in, the development or manufacture of any nuclear explosive device,

then the President shall forthwith report in writing his determination to the Congress and shall forthwith impose the sanctions described in paragraph (2) against that country.

"(2) The sanctions referred to in paragraph (1) are as follows:

"(A) The United States Government shall terminate assistance to that country under the Foreign Assistance Act of 1961, except for humanitarian assistance or food or other agricultural commodities.

"(B) The United States Government shall terminate —

"(i) sales to that country under this Act of any defense articles, defense services, or design and construction services, and

"(ii) licenses for the export to that country of any item on the United States Munitions List.

"(C) The United States Government shall terminate all foreign military financing for that country under this Act.

"(D) The United States Government shall deny to that country any credit, credit guarantees, or other financial assistance by any department, agency, or instrumentality of the United States Government, except that the sanction of this subparagraph shall not apply —

"(i) to any transaction subject to the reporting requirements of title V of the National Security Act of 1947 (relating to congressional oversight of intelligence activities), or

"(ii) to humanitarian assistance.

"(E) The United States Government shall oppose, in accordance with section 701 of the International Financial Institutions Act (22 U.S.C. 262d), the extension of any loan or financial or technical assistance to that country by any international financial institution.

"(F) The United States Government shall prohibit any United States bank from making any loan or providing any credit to the government of that country, except for loans or credits for the purpose of purchasing food or other agricultural commodities.

"(G) The authorities of section 6 of the Export Administration Act of 1979 shall be used to prohibit exports to that country of specific goods and technology (excluding food and other agricultural commodities), except

that such prohibition shall not apply to any transaction subject to the reporting requirements of title V of the National Security Act of 1947 (relating to congressional oversight of intelligence activities).

"(3) As used in this subsection—

"(A) the term 'design information' means specific information that relates to the design of a nuclear explosive device and that is not available to the public; and

"(B) the term 'component' means a specific component of a nuclear explosive device.

"(4)(A) Notwithstanding paragraph (1) of this subsection, the President may, for a period of not more than 30 days of continuous session, delay the imposition of sanctions which would otherwise be required under paragraph (1)(A) or (1)(B) of this subsection if the President first transmits to the Speaker of the House of Representatives, and to the chairman of the Committee on Foreign Relations of the Senate, a certification that he has determined that an immediate imposition of sanctions on that country would be detrimental to the national security of the United States. Not more than one such certification may be transmitted for a country with respect to the same detonation, transfer, or receipt of a nuclear explosive device.

"(B) If the President transmits a certification to the Congress under subparagraph (A), a joint resolution which would permit the President to exercise the waiver authority of paragraph (5) of this subsection shall, if introduced in either House within thirty days of continuous session after the Congress receives this certification, be considered in the Senate in accordance with subparagraph (C) of this paragraph.

"(C) Any joint resolution under this paragraph shall be considered in the Senate in accordance with the provisions of section 601(b) of the International Security Assistance and Arms Export Control Act of 1976.

"(D) For purposes of this paragraph, the term "joint resolution" means a joint resolution the matter after the resolving clause of which is as follows: "That the Congress having received on _____ a certification by the President under section 102(b)(4) of the Arms Export Control Act with respect to _____, the Congress hereby authorizes the President to exercise the waiver authority contained in section 102(b)(5) of that Act.", with the date of receipt of the certification inserted in the first blank and the name of the country inserted in the second blank.

"(5) Notwithstanding paragraph (1) of this subsection, if the Congress enacts a joint resolution under paragraph (4) of this subsection, the President may waive any sanction which would otherwise be required under paragraph (1)(A) or (1)(B) if he determines and certifies in writing to the Speaker of the House of Representatives and the Committee on Foreign Relations of the Senate that the imposition of such sanction would be seriously prejudicial to the achievement of United States nonproliferation objectives or otherwise jeopardize the common defense and security. The President shall transmit with such certification a statement setting forth the specific reasons therefor.

"(6)(A) In the event the President is required to impose sanctions against a country under paragraph (1)(C) or (1)(D), the President shall forthwith so inform such country and shall impose the required sanctions beginning 30 days after submitting to the Congress the report required by paragraph (1) unless, and to the extent that, there is enacted during the 30-day period a law prohibiting the imposition of such sanctions.

"(B) Notwithstanding any other provision of law, the sanctions which are required to be imposed against a country under paragraph (1)(C) or (1)(D) shall not apply if the President determines and certifies in writing to the Committee on Foreign Relations and the Committee on Governmental Affairs of the Senate and the Committee on Foreign Affairs of the House of Representatives that the application of such sanctions

against such country would have a serious adverse effect on vital United States interests. The President shall transmit with such certification a statement setting forth the specific reasons therefor.

"(7) For purposes of this subsection, continuity of session is broken only by an adjournment of Congress sine die and the days on which either House is not in session because of an adjournment of more than three days to a day certain are excluded in the computation of any period of time in which Congress is in continuous session.

"(8) The President may not delegate or transfer his power, authority, or discretion to make or modify determinations under this subsection.

"(c) NON-NUCLEAR-WEAPON STATE DEFINED. — As used in this section, the term 'non-nuclear-weapon state' means any country which is not a nuclear-weapon state, as defined in Article IX(3) of the Treaty on the Non-Proliferation of Nuclear Weapons.

"SEC. 103. DEFINITION OF NUCLEAR EXPLOSIVE DEVICE. 22 USC 2799aa-2.

"As used in this chapter, the term 'nuclear explosive device' has the meaning given that term in section 830(4) of the Nuclear Proliferation Prevention Act of 1994.".

(b) REPEALS. — Sections 669 and 670 of the Foreign Assistance Act of 1961 are hereby repealed. 22 USC 2429, 2429a.

(c) REFERENCES IN LAW. — Any reference in law as of the date of enactment of this Act to section 669 or 670 of the Foreign Assistance Act of 1961 shall, after such date, be deemed to be a reference to section 101 or 102, as the case may be, of the Arms Export Control Act.

SEC. 827. REWARD.

Section 36(a) of the State Department Basic Authorities Act of 1956 (22 U.S.C. 2708(a)) is amended —

(1) by redesignating paragraphs (1) through (3) as subparagraphs (A) through (C), respectively;

(2) by inserting "(1)" after "(a)"; and

(3) by adding at the end the following:

"(2) For purposes of this subsection, the term 'act of international terrorism' includes any act substantially contributing to the acquisition of unsafeguarded special nuclear material (as defined in section 830(8) of the Nuclear Proliferation Prevention Act of 1994) or any nuclear explosive device (as defined in section 830(4) of that Act) by an individual, group, or non-nuclear-weapon state (as defined in section 830(5) of that Act).".

SEC. 828. REPORTS.

22 USC 2593a.

(a) CONTENT OF ACDA ANNUAL REPORT.—Section 51(a) of the Arms Control and Disarmament Act, as inserted by this Act, is amended—

(1) by striking "and" at the end of paragraph (5);

(2) by striking the period at the end of paragraph (6) and inserting "; and";

(3) by adding after paragraph (6) the following new paragraph:

"(7) a discussion of any material noncompliance by foreign governments with their binding commitments to the United States with respect to the prevention of the spread of nuclear explosive devices (as defined in section 830(4) of the Nuclear Proliferation Prevention Act of 1994) by non-nuclear-weapon states (as defined in section 830(5) of that Act) or the acquisition by such states of unsafeguarded special nuclear material (as defined in section 830(8) of that Act), including—

"(A) a net assessment of the aggregate military significance of all such violations;

"(B) a statement of the compliance policy of the United States with respect to violations of those commitments; and

"(C) what actions, if any, the President has taken or proposes to take to bring any nation committing such a violation into compliance with those commitments.'; and

(4) by adding at the end the following new subsection:

"(c) REPORTING CONSECUTIVE NONCOMPLIANCE. — If the President in consecutive reports submitted to the Congress under this section reports that any designated nation is not in full compliance with its binding nonproliferation commitments to the United States, then the President shall include in the second such report an assessment of what actions are necessary to compensate for such violations.".

(b) REPORTING ON DEMARCHES. — (1) It is the sense of the Congress that the Department of State should, in the course of implementing its reporting responsibilities under section 602(c) of the Nuclear Non-Proliferation Act of 1978, include a summary of demarches that the United States has issued or received from foreign governments with respect to activities which are of significance from the proliferation standpoint.

(2) For purposes of this section, the term "demarche" means any official communication by one government to another, by written or oral means, intended by the originating government to express —

(A) a concern over a past, present, or possible future action or activity of the recipient government, or of a person within the jurisdiction of that government, contributing to the global spread of unsafeguarded special nuclear material or of nuclear explosive devices;

(B) a request for the recipient government to counter such action or activity; or

(C) both the concern and request described in subparagraphs (A) and (B).

SEC. 829. TECHNICAL CORRECTION.

Section 133 b. of the Atomic Energy Act of 1954 (42 U.S.C. 2160c) is amended by striking "20 kilograms" and inserting "5 kilograms".

SEC. 830. DEFINITIONS.

For purposes of this part—

(1) the term "foreign person" means—

(A) an individual who is not a citizen of the United States or an alien admitted for permanent residence to the United States; or

(B) a corporation, partnership, or other nongovernment entity which is created or organized under the laws of a foreign country or which has its principal place of business outside the United States;

(2) the term "goods or technology" means—

(A) nuclear materials and equipment and sensitive nuclear technology (as such terms are defined in section 4 of the Nuclear Non-Proliferation Act of 1978), all export items designated by the President pursuant to section 309(c) of the Nuclear Non-Proliferation Act of 1978, and all technical assistance requiring authorization under section 57 b. of the Atomic Energy Act of 1954, and

(B) in the case of exports from a country other than the United States, any goods or technology that, if exported from the United States, would be goods or technology described in subparagraph (A);

(3) the term "IAEA safeguards" means the safeguards set forth in an agreement between a country and the International Atomic Energy Agency, as authorized by Article III(A)(5) of the Statute of the International Atomic Energy Agency;

(4) the term "nuclear explosive device" means any device, whether assembled or disassembled, that is designed to produce an instantaneous release of an amount of nuclear energy from special nuclear material that is greater than the amount of energy that would be released from the detonation of one pound of trinitrotoluene (TNT);

(5) the term "non-nuclear-weapon state" means any country which is not a nuclear-weapon state, as defined by Article IX (3) of the Treaty on the Non-Proliferation of Nuclear Weapons, signed at Washington, London, and Moscow on July 1, 1968;

(6) the term "special nuclear material" has the meaning given that term in section 11 aa. of the Atomic Energy Act of 1954 (42 U.S.C. 2014aa);

(7) the term "United States person" means—

(A) an individual who is a citizen of the United States or an alien admitted for permanent residence to the United States; or

(B) a corporation, partnership, or other nongovernment entity which is not a foreign person; and

(8) the term "unsafeguarded special nuclear material" means special nuclear material which is held in violation of IAEA safeguards or not subject to IAEA safeguards (excluding any quantity of material that could, if it were exported from the United States, be exported under a general license issued by the Nuclear Regulatory Commission).

SEC. 831. EFFECTIVE DATE.

The provisions of this part, and the amendments made by this part, shall take effect 60 days after the date of the enactment of this Act.

Chapter 9:
Hazardous Exports

Chapter 9:
Hazardous Exports

CHAPTER 9

HAZARDOUS EXPORTS

9.1 EPA
- **9.1.1 Hazardous Waste**
- **9.1.2 Toxic Substances**
- **9.1.3 Pesticides**

9.2 CPSC

9.3 FDA

Three different agencies administer controls on the exports of hazardous items, the Environmental Protection Agency (EPA), the Consumer Products Safety Commission (CPSC), and the Food and Drug Administration (FDA).

9.1 EPA

EPA administers export controls concerning hazardous wastes, toxic substances, and pesticides.

9.1.1 Hazardous Waste

These controls are required by section 3017 of the Resource Conservation and Recovery Act (RCRA) as amended by the Hazardous and Solid Waste Amendments of 1984 (HSWA)[1]. Regulations, which became effective November 8, 1986, were published in the August 8, 1986, Federal Register (40 C.F.R. §§ 262.50-262.58 and 263). These regulations prohibit the export of hazardous waste unless the following requirements are met:

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[1] 42 U.S.C. § 6938ff.

- written notification to EPA 60 days before the initial shipment is intended to leave the United States;
- prior written consent by the receiving country;
- attachment of a copy of that consent to the manifest for each shipment;
- conformance of each shipment to such consent.

"Hazardous waste" means the "authorized State universe" plus those wastes identified or listed by EPA pursuant to HSWA. "Authorized State universe" means wastes in the Federal universe (identified or listed by EPA) for which the State was authorized at the time it first received final authorization plus any wastes subsequently identified or listed by EPA for which the State has received authorization (by filing a request for approval of a program revision). The "authorized State universe" does not include wastes which are identified or listed by the State as hazardous wastes under State law but are not identified or listed as such by EPA. The only period of time when any inconsistency among States might occur is during the period allowed States to update their programs to add a non-HSWA waste newly listed or identified by EPA.[2]

Alternatively, an export may take place if it conforms to the terms of an agreement between the United States and the government of the receiving country establishing hazardous waste notice, export, and enforcement procedures. The section of the regulations intended to describe international agreements is "reserved" for future use; but the United States and Canada and the United States and Mexico entered into bilateral agreements in 1986 and the United States is bound by a March 30, 1992, OECD decision. On May 5, 1992, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal entered into force for the first twenty countries that ratified it.[3] The United States has not ratified it. Therefore, the Basel Convention has not changed U.S. requirements regarding exports of hazardous waste. However,

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[2] 40 C.F.R. § 271.21.

[3] Argentina, Australia, China, Czechoslovakia (now Czech Republic and Slovakia), El Salvador, Finland, France, Hungary, Jordan, Liechtenstein, Mexico, Nigeria, Norway, Panama, Romania, Saudi Arabia, Sweden, Switzerland, Syria, and Uruguay.

because of this Convention, transboundary movements may take place between selected Basel Parties and the United States only pursuant to preexisting government-to-government arrangements, *i.e.,* the Canadian and Mexican bilateral agreements and the OECD decision. The Canadian and Mexican agreements, the OECD decision, and the Basel Convention are described in the Federal Register of May 13, 1992.

The regulations also include provisions governing special manifest requirements, exception reporting, annual reporting, recordkeeping, transporter responsibilities, confidentiality, and State authorization.

The notification must include information on transit countries, in order to reduce the risk of circumvention by leaving the waste in a transit country for an indefinite period. The exporter must also respond to an EPA request to furnish additional information which a receiving country requests in order to respond to a notification.

This notification is not required for a narrow set of listed hazardous secondary materials when recycled in a particular manner nor for wastes excluded from the domestic manifesting requirement.

In conjunction with the Department of State, EPA will provide to the receiving country and any transit countries a notification which it determines satisfies all the requirements. EPA is also the channel for forwarding to the exporter a receiving country's Acknowledgment of Consent, or objection, or withdrawal of a prior consent, and any responses from transit countries.

9.1.2 Toxic Substances

Under section 12(b) of the Toxic Substances Control Act,[4] exporters must notify EPA if they export or intend to export a chemical substance or mixture relevant to various other sections of that Act. A 64-page list of the chemicals that triggered section 12(b) export notification as of December 31, 1992, may be obtained by telephoning 202-554-1404. However, EPA recommends that an exporter call and ask about a particular chemical in order to be certain that the applicability (or non-applicability) of the list to that chemical is understood and is up-to-date.

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[4] TSCA; Pub. L. No. 94-469 (Oct. 11, 1976), 15 U.S.C. § 2611(b).

The notice must be in writing and be postmarked within seven days of forming the intent to export or on the date of export, whichever is earlier. EPA notifies the importing country of the chemical identity and a summary of the regulatory action taken or the availability of data under TSCA.

Regulations may be found at 40 C.F.R. § 707.

9.1.3 Pesticides

Section 17(a)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)[5] specifies requirements for producers of pesticides, devices, and active ingredients used in producing pesticides intended solely for export concerning labels, misbranding, registration, production reporting, record-keeping, and inspection.

Section 17(a)(2) of FIFRA requires that an exporter of any pesticide not registered for use in the United States obtain a signed statement from the foreign purchaser acknowledging awareness that the pesticide is not registered for use in the United States and cannot be sold in the United States. EPA sends a copy of this statement to the government of the importing country.

Section 17(b) of FIFRA requires EPA to notify other countries and international agencies of EPA's regulatory actions.

Regulations appear in 40 C.F.R. part 168. These were substantially revised in a February 18, 1993, Federal Register Notice. The revision of 40 C.F.R. § 168.75 concerning exporting procedures became effective June 1, 1993.

With certain exceptions, prior to the export of an unregistered pesticide, an exporter must submit to EPA not only the statement required by FIFRA section 17(a)(2) but also a certification signed by the exporter that the export did not occur until the foreign purchaser's statement had been obtained. These statements may be submitted on either a pershipment or an annual basis. In addition, annual production reports must be submitted to EPA.

Exceptions apply to pesticides which could not be sold in the United States only because of specified minor deviations from labeling, packaging, or composition requirements or if the unregistered product is exported only for research and development and

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[5] 7 U.S.C. § 1360.

would involve neither specified types of land or aquatic use nor tests on animals intended for food or feed.

Principal changes becoming effective in 1993 were:

- warning statements on labels of exported products must be multilingual;
- purchaser acknowledgment statements must identify the product and country or country of destination; and
- EPA will notify other countries immediately of actions as a result of human health or environmental concerns.

9.2 CPSC

Section 18 of the Consumer Product Safety Act of 1978,[6] requires an exporter of a product which is not in conformity with an applicable consumer product safety standard or is declared under section 9 of that Act to be a banned hazardous substance to so notify the Consumer Product Safety Commission. The Commission must promptly notify the government of the importing country of such exportation and the basis for such safety standard or rule.

Procedures for export of noncomplying products are contained in 16 C.F.R. § 1019, which implement not only the above cited Consumer Product Safety Act but also sections 2(p) and 2(q) of the Federal Hazardous Substances Act,[7] concerning misbranded or banned hazardous substances, and section 4 of the Flammable Fabrics Act,[8] concerning a material failing to conform with an applicable flammability standard or regulation.

Notification must be received by the Commission at least 30 days before the goods leave U.S. customs territory, except that an exporter may request a reduced time. The reduced time must be at least 10 days and the request must be received at least three working days before the exporter wishes the reduced time period to begin.

Foreign governments intending to prohibit entry of goods that are the subject of a Commission notification are expected to initiate action to prevent such entry and to notify the exporter directly of that intent.

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[6] Pub. L. No. 95-631, 15 U.S.C. § 2067.

[7] 15 U.S.C. § 1261.

[8] 15 U.S.C. §§ 1191, 1193.

Exempted from these requirements are items that:

- fail to comply with a standard or regulation only because the label is in a language other than English;
- are samples not for resale; or
- are misbranded hazardous substances only because of failure to comply with a child-resistant packaging requirement under the Poison Prevention Packaging Act of 1970.[9]

9.3 FDA

Under the Drug Export Amendments Act of 1986,[10] which modifies the ban on export of unlicensed biological products codified in 42 U.S.C. § 262, the Food and Drug Administration must approve an application prior to the export of drugs not approved for marketing in the United States or of biological products unlicensed in the United States. The FDA believes that exports of such items to 21 sufficiently sophisticated countries could be regulated by the importing country rather than by the United States, but legislation would be required to modify the ban.

Legislation at 21 U.S.C. § 381(d) bans the export of adulterated or misbranded food or drugs unless they:

- have not been offered for sale on the U.S. market;
- comply with standards applicable to the purchaser;
- are not in conflict with laws of the importing country; and
- are labelled as being intended for export.

Regulations at 21 C.F.R. § 312.110 concern exports of not-yet-approved drugs for the purpose of study. The § 312 regulations have been modified to make it easier for a company to self-certify.

FDA issues certifications of free sale to industry as a courtesy, but not if there is any question of quality.

Except for 21 C.F.R. § 312, FDA controls have not been codified in regulations. A policy review taking place in the summer of 1993 may result in the issuance of regulations.

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[9] 15 U.S.C. § 1471 *et seq.*

[10] 21 U.S.C. § 802.

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Indices

Indices

GLOSSARY

A	Letter following the category number in an Export Control Classification Number (ECCN) on the Commerce Control List (CCL), which indicates that the ECCN controls systems, equipment, and components
ACDA	Arms Control and Disarmament Agency
ACEP	Advisory Committee on Export Policy, an interagency committee at the Assistant Secretary level chaired by Commerce, which meets to consider differences not resolved in the Operating Committee (OC)
AEA	Atomic Energy Act, the authority for controls on nuclear related items, administered by the Nuclear Regulatory Commission, the Department of Energy, and the Department of Commerce
AECA	Arms Export Control Act, the authority for controls on export of munitions, administered by the Department of State
AEN	Administrative Exception Note, a description of items that COCOM had agreed may be exported to COCOM-proscribed destinations at national discretion. The two remaining equivalent notes on the Commerce Control List, in ECCNs 1C018 and 2B018, are called Advisory Notes, use the expression "are likely to be approved for export to satisfactory end-users in Country Group D:1," and are eligibile for License Exception GBS
AG	Australia Group, the countries cooperating in chemical weapons non-proliferation export controls
APA	Administrative Procedures Act
APR	A Commerce License Exception for additional permissive reexports

Asymmetric algorithm	Encryption and decryption using different keys
AT	Anti-terrorism
ATF	Alcohol, Tobacco and Firearms
ATF Form 2	Notice of firearms manufactured or imported
ATF Form 3	Application for tax-exempt transfer of firearms and registration to special (occupational) taxpayer
ATF Form 5	Application for tax exempt transfer and registration of a firearm
ATF Form 9	Application and permit for permanent export of firearms
ATF Form 13/5400.16	Application for explosives license or permit
ATF Form 4483-A	Annual firearms manufacturing and exportation report
ATF Form 5630.5R	Special tax renewal registration and return
AVS	Commerce License Exception for equipment for aircraft or vessels, plane stores or ship stores, and aircraft on temporary sojourn
B	Letter following the category number in an Export Control Classification Number (ECCN) on the Commerce Control List (CCL), which indicates that the ECCN controls test, production, and inspection equipment
BAG	A Commerce License Exception for personal baggage
BATF	Bureau of Alcohol, Tobacco and Firearms, Treasury Department
BOE	Bureau of Explosives, Department of Transportation
BXA	Bureau of Export Administration, the organization within the Department of Commerce, supervised by the Assistant Secretary for Export Administration, which administers Commerce export controls
BXA-748P	A multipurpose application form for a Commerce license to export or reexport or for a Commerce classification

BXA-711	A Commerce form for statement by ultimate consignee and purchaser
BXA-752	A Commerce form for statement of consignee in support of special comprehensive license
C	Letter following the category number in an Export Control Classification Number (ECCN) on the Commerce Control List (CCL), which indicates that the ECCN controls materials
CAA	Competent authority approval, issued by Department of Transportation, Bureau of Explosives
CACR	Cuban Assets Control Regulations, which Treasury administers and which are in 31 C.F.R. § 515
CAD/CAM	computer aided design/computer-aided manufacturing software
CAST	Commercial algorithm with 56 bit key
Category	One of ten groupings of items on the Commerce Control List
CB	Chemical and biological weapons
CBO	Central Boycott Office of the Arab League
CBW	Chemical and biological warfare
CC	Crime control
CCL	Commerce Control List, the list of commodities, software, and technology in 15 C.F.R. § 774 Supplement 1
CDA	Cuban Democracy Act, which tightened controls on exports from overseas subsidiaries
CDT	Center for Defense Trade, Department of State
CE	Computing element
CEP	Circle of equal probability, measure of missile accuracy
CFR	Code of Federal Regulations
CI	Communications intercept
CIV	Commerce License Exception for exports to civil end-users and end-uses in former-COCOM-proscribed countries
CLEO	Chief Law Enforcement Officer
COCOM	Coordinating Committee, an organization of NATO countries less Iceland plus Japan and Australia, which coordinated national controls

	on exports to the former Soviet Union, Albania, Bulgaria, Mongolia, Romania, People's Republic of China, North Korea, and Vietnam until March 31, 1994
Computer tier	One of four groupings of countries differentiating restrictiveness of computer controls
Controlled-in-fact	Firms subject to antiboycott restrictions or eligible for special comprehensive license consignee
COTP	Captain of the port, U.S. Coast Guard
Country Group	A Commerce grouping of countries to indicate destinations to which a license or reporting is, or is not, required, *i.e.,* countries with an "x" in a column in the country chart in 15 C.F.R. § 738 Supplement 1; computer tiers 1, 2, and 3 listed in § 740.7(b)(1), (c)(1), and (d)(1); A:1, A:2, A:3, A:4, B, D:1, D:2, D:3, D:4, E:1, or E:2 listed in 15 C.F.R. § 740 Supplement 1; computer tier 4 listed in 15 C.F.R. § 742.12(a)(2); subject to firearms controls in § 742.17(e); License Exception reporting not required in 15 C.F.R. § 743 Supplement 1; and not subject to certain nuclear end-use restrictions in 15 C.F.R. § 744 Supplement 3; Chemical Warfare Convention states parties in 15 C.F.R. § 745 Supplement 2; embargoed listed in part 746; support document not required except for firearms in 15 C.F.R. § 748.9(a)(1); subject to firearms import certificate procedure in § 748.14(c)
CPMIEC	China Precision Machinery Import-Export Corporation
CPSC	Consumer Product Safety Commission
Crypto with a hole	Product with a cryptographic application interface
CTP	Composite theoretical performance, a computer performance parameter
CTP	Commerce License Exception for computers
CW	Chemical warfare
CW	Continuous wave
CWC	Chemical Warfare Convention

D	Letter following the category number in an Export Control Classification Number (ECCN) on the Commerce Control List (CCL), which indicates that the ECCN controls software
DCAS	Defense Contracts Administrative Services
DD-258	Fingerprint identification card
De minimis	Percentage of U.S. content below which item not subject to EAR
DEA	Data encryption algorithm, DES approved as private sector standard in 1981
Deemed export	Transfer of technology in the United States to a foreign national
DES	Data encryption standard, symmetric, 1977 federal government standard
DGR	Designated government representative
Direct product	Foreign item produced on the basis of U.S.-origin technology
DOC	Department of Commerce
DOD	Department of Defense
DOE	Department of Energy
DOJ	Department of Justice
DOS	Department of State
DOT	Department of Transportation
DRAM	Dynamic random access memory
DS	Directionally solidified
DSA	Digital signature algorithm, asymmetric, cannot encrypt or decrypt
DSP-5	Department of State license application form
DSP-9	Department of State registration statement form
DSP-61	Department of State temporary import application form
DSP-73	Department of State temporary export application form
DSP-83	Department of State non-transfer form, to be signed by consignee
DSP-85	Department of State form to apply for a license to export classified items
DSP-94	Department of State form authorizing export of foreign military sales by the U.S. Government
DSP-119	Department of State amendment application form

DTC	Defense Trade Controls, office in Department of State
DTP	Defense Trade Policy, office in Department of State
DV	Delivery Verification, document executed by government of importing country which exporter may be requested to obtain from importer after delivery
E	Letter following the category number in an Export Control Classification Number (ECCN) on the Commerce Control List (CCL), which indicates that the ECCN controls technology
EAA	Export Administration Act, authority for export controls administered by Department of Commerce which expired in 1994 but is still relevant pursuant to Executive Orders
EAR	Export Administration Regulations, administered by Department of Commerce, in 15 C.F.R. §§ 730–774
EAR99	Items subject to the EAR but not described in an ECCN
EARB	Export Administration Review Board, cabinet-level inter-agency committee, chaired by Secretary of Commerce, to consider issues not resolved by ACEP
ECC	Export Compliance Clerk
ECCN	Export Control Classification Number, assigned to an item on the Commerce Control List
ECO	Export Compliance Officer, ordinarily the employee of an exporter responsible for compliance with export regulations
EEPROM	Electrically erasable programmable read-only memory
EES	Escrowed encryption standard, abandoned government proposal
Effective control	Consignees eligible for special comprehensive license
EI	Encryption items for which jurisdiction was transferred from State to Commerce in 1996

ELA	Encryption licensing arrangement, allows flexible treatment of strong crypto exports to a favored group of end-users
ELISA	Electronic system to inform exporter of status of Department of Defense review of license application
EM	Embargo
ENC	Commerce License Exception for encryption commodities and software
EO	Executive Order
EPA	Environmental Protection Agency
EPCI	Enhanced proliferation control initiative, tightening of controls for nuclear, chemical and biological, and missile purposes
EU	European Union
EXODUS	See Operation EXODUS
Extraterritoriality	Exercise of U.S. jurisdiction in another country's territory
FAA	Federal Aviation Administration, agency whose certification determines that aircraft equipment is subject to Commerce rather than State jurisdiction
FAC	Foreign Assets Controls, North Korea embargo administered by Treasury, in 31 C.F.R. § 500
FADEC	Full authority digital electronic engine controls
FAS	Foreign availability submission, from an exporter to Commerce
FC	Firearms convention
FC	Foreign consignee
FCPA	Foreign Corrupt Practices Act
FDA	Food and Drug Administration
FFT	Fast Fourier Transform
FIFRA	Federal Insecticide, Fungicide, and Rodenticide Act, under which the Environmental Protection Agency conditions exports of items not authorized for sale in the United States on an importer acknowledgement of that fact
FMS	Foreign military sales, by the U.S. Government to a foreign government

FOIA	Freedom of Information Act, exceptions from which have been enacted to protect proprietary information or to permit withholding technical data subject to export controls.
FP	Foreign policy
FR	Federal Register, daily publication containing changes in regulations
FTSR	Foreign Trade Statistics Regulations, containing rules on Shipper's Export Declaration requirements
GBS	Commerce License Exception for commodities to Country Group B
GLONASS	Global navigation satellite system
GOV	Commerce License Exception to international organizations, U.S. Government, and cooperating foreign governments
GPS	Global positioning system, navigational aid using information from satellites
GSN	General software note, 15 C.F.R. § 774 Supplement 2
GTN	General technology note, 15 C.F.R. § 774 Supplement 2
HMX	Nitro-amines (cyclotetramethylene-tetranitramine)
HNS	Hexanitrostilbene
HSWA	Hazardous and Solid Waste Amendments
HTPB	Hydroxyl-terminated polybutadiene
IAEA	International Atomic Energy Agency
IAEL	International Atomic Energy List, one of three lists of items COCOM had agreed to control
IC	Import certificate
ICP	Internal control program, precondition for receiving a Commerce special comprehensive license
IEEPA	International Emergency Economic Powers Act, current authority for Treasury and Commerce export controls

IIC	International import certificate, required to support some Commerce and some State license applications, executed by the government of the importing country
IL	Individual license
IL	Industrial List, one of three lists of items COCOM had agreed to control
IML	International Munitions List, one of three lists of items COCOM had agreed to control
IRC	Internal Revenue Code
ISDN	Integrated services digital network
ISRO	Indian Space Research Organization
ITAR	International traffic in arms regulations, administered by Department of State to implement controls on commercial sales authorized by the Arms Export Control Act, in 22 C.F.R. §§ 120–130
Key	Generation, distribution, entry, and destruction of key settings management
KMI	Commerce License Exception for key management infrastructure encryption software and equipment
LE	License Exception
LR	License required
LVS	Commerce License Exception for limited value shipments
MAC	Message authentication code
MCTL	Military critical technologies list, prepared by Department of Defense pursuant to section 5(d) of the EAA to provide guidance for what should be on the State and Commerce control lists
MFLOPS	Million floating point operations per second, computer measurement
ML	Munitions List, administered by Department of State, in 22 C.F.R. § 121
MOD	Ministry of Defense

MOU	Memorandum of understanding
MRO	Maintenance, repair, and operation
MT	Missile technology
MTCR	Missile Technology Control Regime, international organization established to restrict export of missile-related items
Mtops	Million theoretical operations per second, unit of measurement for composite theoretical performance
N	No
NATO	North Atlantic Treaty Organization, whose members are Belgium, Canada, Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, Netherlands, Norway, Poland, Portugal, Spain, Turkey, United Kingdom, United States
NBC	Nuclear, biological, and chemical
NDAA	National Defense Authorization Act, enacted November 18, 1997
n.e.s	Not elsewhere specified, used in EAR99, the last item in each of the ten categories on the CCL, which describes what is not covered in any ECCN and which requires a license only to embargoed countries and to destinations subject to end-use/end-user controls
NFA	National Firearms Act
NFA	National Firearms Branch of BATF
NISPOM	National industrial security policy operating manual
NLR	No license required, pursuant to the Commerce country chart in 15 C.F.R. § 738 Supplement 1
NMR	Non-magnetic resonance, a type of spectrometer
NNPA	Nuclear Non-Proliferation Act
NP	Nuclear non-proliferation
NPPA	Nuclear Proliferation Prevention Act
NRC	Nuclear Regulatory Commission
NRL	Nuclear referral list, items controlled by Commerce pursuant to section 309(c) of the NNPA

	1978 amendment to the 1954 Atomic Energy Act
NS	National security
NSA	National Security Agency
NSC	National Security Council, to whose Ad Hoc Group on Non-Proliferation the Subgroup on Nuclear Export Coordination reports
NSG	Nuclear Suppliers Group, international organization established to restrict export of items with both nuclear and non-nuclear uses
NSO	National security override, Presidential determination that foreign availability not lead to decontrol (or license approval)
OAC	Office of Antiboycott Compliance, in Commerce
OC	Operating Committee, working level interagency committee, chaired by Commerce, to resolve differing views on Commerce license applications
ODTC	Office of Defense Trade Controls, Department of State
OECD	Organization of Economic Cooperation and Development, source of a decision on hazardous waste exports
OEE	Office of Export Enforcement, in Commerce
OEM	Original equipment manufacturer
OFA	Office of Foreign Availability, Department of Commerce
OFAC	Office of Foreign Assets Control, Treasury Department
OIRA	Office of Industrial Resource Administration, administers short supply export controls in Commerce
Operation EXODUS	Code name to stepped up export control enforcement program by the Customs Service that began in October 1981
OTCA	Omnibus Trade and Competitiveness Act, which amended the Export Administration Act in 1988
PABX	Private automatic branch exchange

PCM	Pulse code modulation
Piggy-backing	Review of a license application for a reason other than the reason stated in the Commerce Control List
PIN	Personal identification number
PL	Public Law
PL check	Pre-license check of reliability of consignee
PM	Political-Military Affairs bureau, Department of State
POP	Performance Oriented Packaging test of container ability to protect explosive while in transit
PRC	People's Republic of China
PTO	Patent and Trademark Office, Department of Commerce
QAM	Quadrature amplitude modulation
RAM	Random access memory
RC2, RC4, RC5	Commercial algorithms with 56-bit keys
RCRA	Resource Conservation and Recovery Act, under which EPA requires a notification of intent to export certain hazardous substances
RDX	Cyclotetramethylene-trinitramine
Red flags	Suspicious business transactions
ROM	Read only memory
RPL	Commerce License Exception for replacement or servicing
RS	Regional stability
RSA	Rivest, Shamir, and Adelman, asymmetric algorithm, can produce digital signatures and encrypt and decrypt messages
RWA	Returned without action
SC	Single crystal
SCL	Special comprehensive license
Scienter	Legal interpretation of the word "knows"
SED	Shipper's Export Declaration
SET	Secure Electronic Transactions protocol
SHPL	Super high power laser

SI	Significant items, transferred from State to Commerce jurisdiction on condition of special Commerce controls
SLI	Shipper's letter of instructions, sent to freight forwarder
SME	Significant military equipment, subjected to special ITAR controls
SNEC	Subgroup on Nuclear Export Coordination, interagency committee that reviews nuclear referral list license applications referred to it by the Department of Energy or the Department of Commerce
SPR	Strategic petroleum reserve
SPR	Commerce License Exception for foreign-origin crude oil owned by a foreign government and stored in the U.S. strategic petroleum reserve
SRAM	Static random access memory
SS	Short supply
SS-SAMPLE	Commerce License Exception for crude oil exports for testing and analysis
STELA	System for tracking export license applications, electronic system to inform exporter of status of Department of Commerce review of license application
STP	Security Transportation Plan
Sub-ACEP	Subcommittee of ACEP, at Deputy Assistant Secretary level
Symmetric algorithm	Encryption and decryption using the same key
TAC	Technical Advisory Committee, industry advisors on export control issues, pursuant to section 5(h) of the EAA
TAPS	Trans-Alaska Pipeline Authorization Act
TAPS	Commerce License Exception for TAPS oil transported by U.S. tankers
TCR	Transaction Control Regulations, Treasury administered nuclear and munitions controls to former-COCOM-proscribed destinations in 31 C.F.R. § 505

TCSEC	Trusted computer system evaluation criteria, specifications for user isolation
TD F 90-22.8	Treasury license application form
TDO	Table of Denial Orders, persons denied exporting privileges
Technology	Technical data and technical assistance, excluding commodities and software
TMP	Commerce License Exception for temporary exports or for exports after temporary imports
TP	Theoretical performance of a single computing element
Transshipment	Intended reexport known at time of export from the United States
TSCA	Toxic Substances Control Act, under which EPA requires a notification of intent to export listed chemicals
TSPA	Symbol on SED indicating technology or software is not subject to the EAR because of being publicly available
TSR	Commerce License Exception for technology or software to Country Group B, restricted by a requirement for a written assurance from the importer
TSU	Commerce License Exception for technology or software unrestricted by an assurance requirement
TWEA	Trading With the Enemy Act, authority, under a grandfather clause, for Treasury embargoes of North Korea and Cuba and on nuclear and munitions controls to former-COCOM-proscribed destinations
UNITA	Faction in Angola subject to Treasury sanctions on arms and related items
USC	United States Code
USG	United States Government
USMIL	United States Munitions Import List
USML	United States Munitions List

WDUL	Wassenaar Dual-Use List
WML	Wassenaar Munitions List
WRC	Commerce License Exception for unprocessed western red cedar
XP	Computers
Y	Yes

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